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OFFICE OF HEARINGS AND APPEALS
BALLSTON BUILDING NO. 3, 4015 WILSON BOULEVARD
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UNITED STATES DEPARTMENT OF THE INTERIOR

WASHINGTON, D.C. 20240

Secretary of the Interior Donald P. Hodel

Office of Hearings and Appeals--Paul T. Baird, Director

Office of the Solicitor-------- Solicitor

INDEX-DIGEST

JANUARY-SEPTEMBER 1985

This index-digest covers all the published and all the important unpublished decisions and opinions of the Department of the Interior for the period from January 1, through September 30, 1985, rendered in the Office of Hearings and Appeals, Ballston Towers, Building No. 3, 4015 Wilson Boulevard, Arlington, Va. 22203 and in the Office of the Solicitor, Interior Building, 18th and C Streets, N.W., Washington, D.C. 20240.

Decisions and opinions cited as appearing in 92 I.D. are published and copies may be obtained by subscription from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. Other decisions and opinions are unpublished and copies may be obtained from the Office of Hearings and Appeals or the Office of the Solicitor as provided in 43 CFR Part 2.

Editor: Rachael Cubbage;

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SYMBOLS

ANCAB - Alaska Native Claims Appeals Board
IA-T - Indian Appeals--Tort
IBCA - Interior Board of Contract Appeals
IBIA - Interior Board of Indian Appeals
IBLA - Interior Board of Land Appeals
IBSMA - Interior Board of Surface Mining Appeals
M - Solicitor's Opinion
OHA - Office of Hearings and Appeals
SEC - Office of the Secretary

ACCOUNTS

FEES AND COMMISSIONS

It is proper for BLM to reject a simultaneous oil and gas lease application submitted with uncollectible filing fees. 43 CFR 3112.2-2(c) (1982) disqualifies simultaneous oil and gas lease applications submitted with uncollectible filing fees and requires payment of the debt as a condition precedent to further participation in the simultaneous leasing program.

Oscar Mineral Group #3, 87 IBLA 48 (May 23, 1985)

PAYMENTS

Where first-drawn applicants for simultaneous oil and gas leases violate provisions of 43 CFR 3112.6-1, by failing to submit the first year's advance rental payment in the proper office within 30 days of notice to do so, and by failing to offer payment personally or through an attorney-in-fact, the offers must be rejected.

Satellite 8307193 et al., 85 IBLA 357 (Mar. 25, 1985)

ACQUIRED LANDS

Land acquired by the United States does not become public land by the mere process of its acquisition, and, in the absence of specific statutory direction to the contrary, is not open for location of mining claims under 30 U.S.C. § 22 (1982).

Silver Buckle Mines, Inc., 84 IBLA 306 (Jan. 7, 1985)

ACT OF MARCH 3, 1891

BLM may properly cancel a right-of-way granted pursuant to the Act of Mar. 3, 1891, 43 U.S.C. § 946 (1970), for violation of the terms of the grant where the grantee has failed to file proof of construction, has failed to maintain a fence around the pump site (including the planting of vines thereon to screen the fence), and has failed to maintain a performance bond pending acceptance of proof of construction. Such cancellation may be effected without a hearing where no material factual issue is in dispute.

James L. Morrison Sr. et al., 87 IBLA 236 (June 19, 1985)

ACT OF JUNE 4, 1897

An application for a recordable disclaimer of the Government's interest in a parcel of land in the Los Padres National Forest (formerly, Pine Mountain and Zaca Lake Forest Reserve) pursuant to sec. 315 of the Federal Land Policy and Management Act of 1976, which parcel was deeded to the Government in 1901 in contemplation of selecting another parcel in lieu thereof pursuant to the Act of June 4, 1897, is properly rejected even though the lieu selection was never consummated, because the Act of July 6, 1960, quieted title to such land in the United States as part of the national forest in which the lands are located.

Frederick Siemon, 86 IBLA 149 (Apr. 25, 1985)

ACT OF SEPTEMBER 19, 1914

The statutory withdrawal pursuant to the Act of Sept. 19, 1914, 38 Stat. 714, of certain lands from location, entry, or appropriation under the public land and mineral laws does not constitute a per se withdrawal from mineral leasing. Leases issued pursuant to the subsequently enacted Mineral Leasing Act of 1920, 30 U.S.C. §§ 181-287 (1982), are generally not considered to constitute a location, entry, or appropriation of the public lands embraced therein as these terms refer to acts by which a claim of title to the land is initiated.

Douglas H. Willson, W. G. Boonenberg, 86 IBLA 135 (Apr. 22, 1985) 92 I.D. 153

ACT OF MAY 21, 1930

Lands under a railroad right-of-way issued pursuant to the Act of Mar. 3, 1875, 18 Stat. 482, are not properly leased under the Mineral Leasing Act of 1920, 30 U.S.C. § 181 (1982), but instead must be leased under the exclusive authority of the Act of May 21, 1930, 30 U.S.C. §§ 301-306 (1982).

William L. Ahls, 85 IBLA 66 (Feb. 11, 1985)

ACT OF APRIL 23, 1932

Ordinarily an application to restore lands within a reclamation withdrawal to mineral entry pursuant to the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982), will be rejected by the Bureau of Land Management where the Bureau of Reclamation recommends against restoration. However, on appeal a case may be remanded for further consideration by the appropriate agencies, including preparation of a mineral report, where it appears warranted by the appellant's showings and willingness to accept terms and conditions to protect the Government's interest.

Robert Limbert, Otis Schcolcraft, 85 IBLA 131 (Feb. 19, 1985)

ACT OF AUGUST 24, 1954

An application for a patent under the Act of Aug. 24, 1954, commonly known as the O'Konski Act, 43 U.S.C. § 1221 (1982), is properly rejected where the applicant fails to establish that the land lies between the meander line of an inland lake or river in Wisconsin as originally surveyed and the meander line of that lake or river as subsequently resurveyed.

Finley F. Martin, John C. Martin, 86 IBLA 254 (May 3, 1985)

ACT OF AUGUST 11, 1955

It is error to prohibit placer mining on powersite lands pursuant to the Act of Aug. 11, 1955, merely on the basis that unrestricted and unmitigated mining operations will adversely affect other land uses or values, because (1) there no longer can be unrestricted or unmitigated placer mining on such claims, and (2) all land has some other use or value which would be affected by mining, so that prohibition for that reason would foreclose mining on all powersite lands and effectively nullify the Act. Whether to allow or prohibit mining requires an evaluation of potential detriments and benefits in each specific case, bearing in mind that Congress generally intended that powersite lands would be open to placer location and operation.

United States Forest Service v. Walter D. Milender, 86 IBLA 181 (Apr. 30, 1985) 92 I.D. 175

ACT OF JULY 6, 1960

While it is within the province of the judicial branch to adjudicate the constitutionality of statutes, it is outside the jurisdiction of the Board. The legislative history of the Act of July 6, 1960, 74 Stat. 334 (Sisk Act) shows Congress fully considered the constitutionality of the compensation provisions therein. The Department is bound to follow those provisions.

The legislative history of the Act of July 6, 1960, clearly shows that Congress concluded that the Federal Government holds title to land relinquished to the Federal Government in anticipation of a forest lieu exchange, notwithstanding the failure to consummate the exchange.

An application for a recordable disclaimer of the Government's interest in a parcel of land in the Los Padres National Forest (formerly, Pine Mountain and Zaca Lake Forest Reserve) pursuant to sec. 315 of the Federal Land Policy and Management Act of 1976, which parcel was deeded to the Government in 1901 in contemplation of selecting another parcel in lieu thereof pursuant to the Act of June 4, 1897, is properly rejected even though the lieu selection was never consummated, because the Act of July 6, 1960, quieted title to such land in the United States as part of the national forest in which the lands are located.

Frederick Siemon, 86 IBLA 149 (Apr. 25, 1985)

ACT OF DECEMBER 24, 1970

Where the Board has referred a high-bid rejection dispute under a geothermal resources lease sale to the Hearings Division for an evidentiary hearing and decision by an Administrative Law Judge, the appropriate standard of proof is that appellant show by a preponderance of the evidence that BLM's action was improper.

It was error for MMS to regard costs associated with the Coso Geothermal Exploratory Hole No. 1, drilled under the auspices of the Department of Energy, as not comparable to estimated costs for the drilling of a geothermal resources exploration well in another area of the Coso Known Geothermal Resources Area, for purposes of establishing the minimum acceptable bid in a competitive sale.

It was error for MMS to estimate drilling costs for a geothermal well on the basis of costs experienced in oil and gas drilling. The two types of exploration are so dissimilar that meaningful cost comparisons cannot be made.

California Energy Co. (On Reconsideration), 85 IBLA 254 (Mar. 6, 1985) 92 I.D. 125

ACT OF OCTOBER 21, 1976

An application for a recordable disclaimer of the Government's interest in a parcel of land in the Los Padres National Forest (formerly, Pine Mountain and Zaca Lake Forest Reserve) pursuant to sec. 315 of the Federal Land Policy and Management Act of 1976, which parcel was deeded to the Government in 1901 in contemplation of selecting another parcel in lieu thereof pursuant to the Act of June 4, 1897, is properly rejected even though the lieu selection was never consummated, because the Act of July 6, 1960, quieted title to such land in the United States as part of the national forest in which the lands are located.

Frederick Siemon, 86 IBLA 149 (Apr. 25, 1985)

ADMINISTRATIVE AUTHORITY

GENERALLY

While it is within the province of the judicial branch to adjudicate the constitutionality of statutes, it is outside the jurisdiction of the Board. The legislative history of the Act of July 6, 1960, 74 Stat. 334 (Sisk Act) shows Congress fully considered the constitutionality of the compensation provisions therein. The Department is bound to follow those provisions.

Frederick Siemon, 86 IBLA 149 (Apr. 25, 1985)

ADMINISTRATIVE PRACTICE

An appeal brought by a person who does not fall within the categories of persons authorized by regulation to practice before the Department is subject to dismissal.

Ganawas Corp., 85 IBLA 250 (Mar. 6, 1985)

Where a party challenging acceptance of a dependent resurvey presents sufficient evidence to raise a question of fact whether the dependant resurvey is an accurate reestablishment of a section line, the Board will order a fact-finding hearing pursuant to 43 CFR 4.415.

Stoddard Jacobsen, Robert C. Downer, 85 IBLA 335 (Mar. 22, 1985)

While, as a general rule, amendments to regulations or administrative procedures may be applied to a pending appeal where to do so would benefit an appellant, such amended regulations or procedures may not be applied where third-party rights would be adversely affected.

United States v. Richard R. Ballas, 87 IBLA 88 (May 30, 1985)

Previous oil and gas lease suspensions that were granted, but where the Department allowed lease activity during the period of suspension, were made in the absence of clear legal guidance to the contrary. One was based on the surname of the Solicitor. In such situations, later advice that the action taken is not in accordance with a proper interpretation of the statute should only be given prospective application. However, in the future, suspensions should only be granted or directed in a manner consistent with the law as interpreted in this memorandum.

Oil & Gas Lease Suspension, M-36953 (May 31, 1985) 92 I.D. 293

An appeal brought by a person who does not fall within any of the categories of persons authorized by regulation to practice before the Department is subject to dismissal. Where the record does not show the party presenting the appeal is qualified under the regulations, the appeal will be dismissed.

Robert G. Young, 87 IBLA 249 (June 20, 1985)

ADMINISTRATIVE PROCEDURE

GENERALLY

Written statements concerning public lands, e.g., proof of improvements of mining claims and proof of posting of notices, need not be sworn statements unless the Secretary in his discretion shall so require.

Dennis J. Kitts, 84 IBLA 338 (Jan. 15, 1985)

Previous oil and gas lease suspensions that were granted, but where the Department allowed lease activity during the period of suspension, were made in the absence of clear legal guidance to the contrary. One was based on the surname of the Solicitor. In such situations, later advice that the action taken is not in accordance with a proper interpretation of the statute should only be given prospective application. However, in the future, suspensions should only be granted or directed in a manner consistent with the law as interpreted in this memorandum.

Oil & Gas Lease Suspension, M-36953 (May 31, 1985) 92 I.D. 293

ADJUDICATION

It is premature for the Bureau of Land Management to reject petition/applications for desert land entries merely on the basis of informal information and belief that the State water authority will probably deny the applicants the right to appropriate groundwater for irrigation of the entries where the water authority has taken no official action on the water applications pending before it.

Julie A. Peterson et al., 86 IBLA 118 (Apr. 15, 1985)

ADMINISTRATIVE LAW JUDGES

In an appeal arising from a decision by an Administrative Law Judge, the Board of Land Appeals may make findings of fact and conclusions based upon the record on appeal. The entire record before the Board may be considered in determining whether the decision appealed from is in error, and an appropriate order entered.

Bureau of Land Management v. David & Bonnie Ericsson, 88 IBLA 248 (Sept. 4, 1985)

ADMINISTRATIVE PROCEDURE ACT

In a grazing trespass case initiated by BLM upon an order to show cause, the burden of proof is properly placed upon BLM as the proponent of the order sought to establish by substantial evidence the occurrence of cattle trespass.

Where on appeal BLM challenges findings made by an Administrative Law Judge on grounds that his findings concerning credibility of witnesses are inadequate to justify the decision as announced, the Board of Land Appeals will examine the record to determine whether, on the basis of all evidence, the findings made by the fact-finder are supported by credible testimony.

Bureau of Land Management v. David & Bonnie Ericsson, 88 IBLA 248 (Sept. 4, 1985)

ADMINISTRATIVE PROCEDURE--Continued

ADMINISTRATIVE REVIEW

Administrative appeals within the Bureau of Indian Affairs are normally decided by the Deputy Assistant Secretary--Indian Affairs (Operations) under authority delegated from the Assistant Secretary for Indian Affairs. If, however, the Assistant Secretary considers an appeal in place of the Deputy Assistant Secretary, he is subject to the 30-day period for decision set forth in 25 CFR 2.19.

Interim Ad Hoc Committee of the Karok Tribe v. Area Director, Sacramento Area Office, Bureau of Indian Affairs, 13 IBIA 76 (Jan. 8, 1985) 92 I.D. 46

As an appellate tribunal, the Board of Land Appeals may not make initial adjudicatory decisions on matters which should properly be submitted to and decided by BLM, nor does the Board render advisory opinions.

Edgar W. White, 85 IBLA 161 (Feb. 25, 1985)

As an appellate tribunal, the Board of Land Appeals may not make initial adjudicatory decisions on matters which properly should be submitted to and decided by BLM, nor does the Board render advisory opinions or opinions in hypothetical cases.

State of Alaska, 85 IBLA 170 (Feb. 26, 1985)

Where the facts and law are comprehensively set forth in an Administrative Law Judge's decision recommending reversal of easements reserved under authority of sec. 17(b) of the Alaska Native Claims Settlement Act, the recommended decision may be adopted as the final decision of the Board.

Chitina Native Corp., 85 IBLA 311 (Mar. 21, 1985)

Where the facts and the law are properly set forth in an Administrative Law Judge's decision recommending affirming a BLM decision to reserve a site easement pursuant to sec. 17(b) of the Alaska Native Claims Settlement Act, the recommended decision may be adopted as the final decision of the Board.

Tetlin Native Corp., 86 IBLA 325 (May 16, 1985)

BURDEN OF PROOF

Where the reasonable rental value of Government-furnished quarters has been determined in accordance with accepted appraisal procedures pursuant to Departmental directives, and the occupant alleges that his rent is excessive, the burden is on the occupant to prove by positive, specific, and substantial evidence that the appraisal is in error.

Appeal of James P. Glynn, 6 OHA 13 (Feb. 6, 1985)

The burden of proving the error of an initial Departmental Indian probate decision is on the party challenging the decision.

Estate of John Walter Few Tails, 13 IBIA 127 (Feb. 28, 1985)

ADMINISTRATIVE PROCEDURE--Continued

BURDEN OF PROOF--Continued

Where a party appeals the BLM issuance of special recreation use permits, it is the obligation of appellant to show that the determinations to issue the permits are erroneous. Unless a statement of reasons shows adequate basis for appeal and the allegations are supported with evidence showing error, the appeals cannot be afforded favorable consideration.

Mendocino County Tax-Payers Land Use Committee, 86 IBLA 319 (May 16, 1985)

The burden of establishing a valid color-of-title claim is on the claimant.

William T. Bertagnole, 87 IBLA 34 (May 23, 1985)

There is a presumption of regularity which supports the official acts of public officers in the proper discharge of their duties. When an appellant asserts the affidavit of annual assessment work was mailed to BLM, but lost, appellant must submit evidence that it was received by BLM in order to overcome this presumption.

Carmelita M. Holland, 87 IBLA 175 (June 13, 1985)

In a grazing trespass case initiated by BLM upon an order to show cause, the burden of proof is properly placed upon BLM as the proponent of the order sought to establish by substantial evidence the occurrence of cattle trespass.

Bureau of Land Management v. David & Bonnie Ericsson, 88 IBLA 248 (Sept. 4, 1985)

HEARINGS

A sodium prospecting permittee who applies for a sodium preference right lease, alleging with supportive data that he has discovered a valuable deposit of sodium and that the land is chiefly valuable for sodium, as required by sec. 24 of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 262 (1982), is entitled to a hearing before an Administrative Law Judge, pursuant to the provisions of 43 CFR 3521.1-1(j)(2), before his lease application may be finally rejected.

Yankee Gulch Joint Venture et al., 84 IBLA 353 (Jan. 22, 1985)

Where a party challenging acceptance of a dependent resurvey presents sufficient evidence to raise a question of fact whether the dependant resurvey is an accurate reestablishment of a section line, the Board will order a fact-finding hearing pursuant to 43 CFR 4.415.

Stoddard Jacobsen, Robert C. Downer, 85 IBLA 335 (Mar. 22, 1985)

A hearing is not necessary in the absence of a material issue of fact, which, if proven, would alter the disposition of the matter. A hearing is not necessary where the dispute does not involve facts, but involves the proper application and interpretation of those facts, and the Bureau of Land Management properly reviewed the same information submitted to this Board.

Woods Petroleum Co., 86 IBLA 46 (Apr. 10, 1985)

ADMINISTRATIVE PROCEDURE--Continued

HEARINGS--Continued

Mining claims located on lands closed to mineral entry are null and void from their inception as a matter of law, and no property rights are created thereby. Therefore, no contest proceeding, notice, or hearing is required preliminary to a decision holding that such claims are invalid. The fact of such claims being void does not depend upon any act or decision of an administrative official.

Walter MacEwen, Malcolm MacEwen, 87 IBLA 210 (June 18, 1985)

A Native allotment applicant is required to make satisfactory proof of substantially continuous use and occupancy of land claimed for a minimum period of 5 years. Such use and occupancy contemplates substantial actual possession or use of the land at least potentially exclusive of others. Where the evidence in the record does not establish applicant's potentially exclusive use of an allotment, and a Native corporation denies the appellant's claims to the lands sought, the Bureau of Land Management shall institute contest proceedings so that evidence as to applicant's entitlement to the allotment may be presented.

Pedro Bay Corp., 88 IBLA 349 (Sept. 24, 1985)

STANDING

A mining claimant may be allowed to file a brief in the appeal of a conflicting claimant.

George R. Schultz et al., 85 IBLA 77 (Feb. 14, 1985) 92 I.D. 83

Where state selection applications were rejected by decisions approving conflicting Native allotment applications, the State of Alaska has standing to appeal those decisions to the Board of Land Appeals.

State of Alaska, 85 IBLA 196 (Feb. 27, 1985)

SUBSTANTIAL EVIDENCE

The Board of Indian Appeals will show deference to an Administrative Law Judge's determination of the credibility of evidence and testimony.

Estate of Albin (Alvin) Shemamy, 13 IBIA 258 (Sept. 26, 1985)

ALASKA

GENERALLY

An application to purchase a headquarters site is properly rejected where the applied-for land is not unreserved public land because the land has been segregated from all forms of appropriation under the public land laws under a prior recreation and public purpose classification pursuant to the Act of June 14, 1926, as amended, 43 U.S.C. § 869 (1982).

Mary S. Brandt, 85 IBLA 140 (Feb. 20, 1985)

ALASKA--Continued

ALASKA NATIVE CLAIMS SETTLEMENT ACT

Sec. 14(h)(1) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613(h)(1) (1982), authorizes the Secretary of the Interior to withdraw and convey existing historical places and cemetery sites to the appropriate regional corporation. A historical site application is properly rejected where the subject land was withdrawn by Public Land Order No. 5180, pursuant to 43 U.S.C. § 1616(d)(1) (1982), or withdrawn by Public Land Order No. 5250, pursuant to 43 U.S.C. § 1616(d)(2) (1982).

Bering Straits Native Corp., 87 IBLA 96 (May 30, 1985)

Mining claims located on land closed to entry and location under the mining laws by a withdrawal order of the Secretary of the Interior pursuant to the Alaska Native Claims Settlement Act are null and void ab initio; however, where such a withdrawal order does not specifically close the land to mineral location, but only to mineral leasing, and there is no indication that mineral location was to be foreclosed, the withdrawal order will not be held to preclude mineral location.

Whelan's Mining & Exploration, Inc., 88 IBLA 336 (Sept. 19, 1985)

HEADQUARTERS SITES

An application to purchase a headquarters site is properly rejected where the applied-for land is not unreserved public land because the land has been segregated from all forms of appropriation under the public land laws under a prior recreation and public purpose classification pursuant to the Act of June 14, 1926, as amended, 43 U.S.C. § 869 (1982).

Mary S. Brandt, 85 IBLA 140 (Feb. 20, 1985)

HOMESTEADS

Neither actual nor constructive notice of a Departmental decision is accomplished by an attempted service using certified mail where the delivering post office returns the decision to the Department after 7 days and it affirmatively appears that the addressee had not moved nor refused delivery, and the address used was his address of record.

While 43 U.S.C. § 1165 (1982) provides for issuance of a patent to an entryman upon a 2-year lapse following issuance of "receipt" when no contest is then pending, the statutory 2-year period does not begin to run at the time the entryman files his final proof, but begins only upon payment for the land. Where appellant had not paid for the land sought to be patented, but had only paid fees associated with filing his homestead entry, he was not entitled to patent.

Failure by the Government to deliver a notice of contest action brought against a homestead entry within 30 days of commencement of action does not affect the validity of the complaint where notice of the action is given to the entryman in a reasonably timely manner.

The Department of the Interior does not retain jurisdiction to adjudicate the merits of a homestead entryman's claim that he has a valid existing right which is prior to that asserted by Alaska where the land sought by the entryman was tentatively approved for conveyance to the State of Alaska since sec. 906(c)(1) of the Alaska National Interest Lands Conservation Act legislatively confirmed all tentative

ALASKA--Continued

HOMESTEADS--Continued

approvals of state land selections, subject to valid existing rights, and conveyed the land in dispute out of Federal control.

The Department is barred by the provisions of 43 U.S.C. § 1166 (1982) from challenging the conveyance of land to the State of Alaska by sec. 906 of the Alaska National Interest Lands Conservation Act, confirming tentative approvals of State land selections subject to valid rights, where more than 6 years have passed since the conveyance. Since the lands here conveyed legislatively to the State were tentatively approved for conveyance in 1976, and since the Act makes such conveyance effective as of the date of tentative approval, provision of 43 U.S.C. § 1166 (1982) bars any possibility of Departmental intervention on behalf of the entryman in this case.

Terry L. Wilson, 85 IBLA 206 (Feb. 28, 1985)
92 I.D. 109

LAND GRANTS AND SELECTIONS

When BLM declares a mining claim null and void ab initio because the claim was located on land segregated from entry and location under the mining laws, the mining claimant may rebut that finding by showing that he merely amended a valid presegregation location of the claim. However, to do so, he must show that he is the owner of the claim through a regular chain of title. An unsupported allegation that the previous owner "gave" him the claim 24 years ago will not suffice. The United States has the right to invoke the statute of frauds in order to clear title to the public lands.

Hugh B. Fate, Jr., et al., 86 IBLA 215 (Apr. 30, 1985)

Under 43 CFR 2091.6-4 and 2627.4(b), the filing of an application by the State of Alaska to select lands segregates those lands from all subsequent appropriation, including location under the mining law. A mining claim located on land segregated and closed to mineral entry is properly declared null and void ab initio.

Thomas C. Bay, Joyce R. Bay, 87 IBLA 194 (June 13, 1985)

NATIVE ALLOTMENTS

Where, on appeal from rejection by BLM of a Native allotment application pursuant to an adjudication, precipitated only by the filing of a State protest in accordance with sec. 905(a) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a) (1982), the State withdraws its protest in a stipulation agreed to by all parties, the Board will vacate the decision appealed from and remand the case to BLM with instructions to hold the application for approval under the statute.

Luke F. Kagak, 84 IBLA 350 (Jan. 17, 1985)

Where the State of Alaska appeals a decision holding that a Native allotment is not subject to a right-of-way granted to the State and on appeal the heirs of the allottee relinquish that part of the allotment in conflict with the right-of-way, the issue is moot and the appeal is dismissed.

State of Alaska, 85 IBLA 170 (Feb. 26, 1985)

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

Native allotment applications describing land in Alaska within a State selection application filed prior to Dec. 18, 1971, are generally excepted from the statutory approval afforded by sec. 905(a)(1) of the Alaska National Interest Lands Conservation Act and must be adjudicated under the provisions of the Alaska Native Allotment Act.

Where the record in a Native allotment case contains significant evidence refuting the existence of substantially continuous use and occupancy at least potentially exclusive of others, a decision approving the allotment without any analysis of the facts to support the adjudication will be set aside as unsupported by the record and a contest ordered.

State of Alaska, 85 IBLA 196 (Feb. 27, 1985)

A right-of-way for an electric transmission line issued pursuant to the Act of Mar. 4, 1911, over lands to which, at the time of issuance, an Alaska Native had an inchoate right through use and occupancy, cannot be defeated by subsequent determination of entitlement to an allotment for such lands, and the allotment must be made subject to the right-of-way. A decision holding such a right-of-way null and void must be reversed.

Golden Valley Electric Ass'n, 85 IBLA 363 (Mar. 25, 1985)

Sec. 905(c) of Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(c) (1982), authorizes a Native allotment applicant to amend the description of the land in his application to accurately describe the parcel for which he applied. It does not authorize an applicant to substitute different land.

Joash Tukle, 86 IBLA 26 (Mar. 29, 1985)

An interim conveyance to a Native corporation under the Alaska Native Claims Settlement Act effectively conveys title to the land, subject to valid existing rights. A conflicting application based on settlement and occupancy maintained under laws leading to acquisition of title is properly excluded from an ANCSA conveyance. Where a conflicting application has been relinquished prior to conveyance, and hence was not excluded, the Department has no authority to reinstate the application pursuant to a request filed subsequent to the interim conveyance.

Kenai Natives Ass'n, Inc., 87 IBLA 58 (May 28, 1985)

Native allotment applications which are protested by an Alaskan Native corporation are not legislatively approved by the Alaska National Interest Lands Conservation Act, sec. 905(a)(1). Such applications must be adjudicated pursuant to the requirements of the Alaska Native Allotment Act, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970).

A Native allotment applicant is required to make satisfactory proof of substantially continuous use and occupancy of land claimed for a minimum period of 5 years. Such use and occupancy contemplates substantial actual possession or use of the land at least potentially exclusive of others. Where the evidence in the record does not establish applicant's potentially exclusive use of an allotment, and a Native corporation denies the appellant's claims to the lands sought, the Bureau of Land Management shall

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

institute contest proceedings so that evidence as to applicant's entitlement to the allotment may be presented.

Where conflicting evidence exists concerning a Native allotment applicant's use and occupancy of the land claimed which raises material factual issues, the Bureau of Land Management should initiate a Government contest so that those issues can be resolved at a hearing.

Pedro Bay Corp., 88 IBLA 349 (Sept. 24, 1985)

POSSESSORY RIGHTS

An application to purchase a headquarters site is properly rejected where the applied-for land is not unreserved public land because the land has been segregated from all forms of appropriation under the public land laws under a prior recreation and public purpose classification pursuant to the Act of June 14, 1926, as amended, 43 U.S.C. § 869 (1982).

Mary S. Brandt, 85 IBLA 140 (Feb. 20, 1985)

STATEHOOD ACT

Under 43 CFR 2091.6-4 and 2627.4(b), the filing of an application by the State of Alaska to select lands segregates those lands from all subsequent appropriation, including location under the mining law. A mining claim located on land segregated and closed to mineral entry is properly declared null and void ab initio.

Thomas C. Bay, Joyce B. Bay, 87 IBLA 194 (June 13, 1985)

Under 43 CFR 2091.6-4 and 2627.4(b), the filing of a state's application to select lands, where the filing is regular on its face, segregates the lands from all subsequent appropriation, including location and entry under the mining laws. Where a selection application filed by the State of Alaska pursuant to sec. 6(b) of the Alaska Statehood Act, 72 Stat. 339, seeks to include national forest lands, the application is not regular on its face because national forest lands cannot be selected under authority of sec. 6(b) of the Act.

B. J. Toohey, C. E. Toohey, & C. W. Toohey, 88 IBLA 66 (July 23, 1985) 92 I.D. 317

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT

GENERALLY

Where, on appeal from rejection by BLM of a Native allotment application pursuant to an adjudication, precipitated only by the filing of a State protest in accordance with sec. 905(a) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a) (1982), the State withdraws its protest in a stipulation agreed to by all parties, the Board will vacate the decision appealed from and remand the case to BLM with instructions to hold the application for approval under the statute.

Luke F. Kagak, 84 IBLA 350 (Jan. 17, 1985)

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--Continued

GENERALLY--Continued

The Department of the Interior does not retain jurisdiction to adjudicate the merits of a homestead entryman's claim that he has a valid existing right which is prior to that asserted by Alaska where the land sought by the entryman was tentatively approved for conveyance to the State of Alaska since sec. 906(c)(1) of the Alaska National Interest Lands Conservation Act legislatively confirmed all tentative approvals of state land selections, subject to valid existing rights, and conveyed the land in dispute out of Federal control.

The Department is barred by the provisions of 43 U.S.C. § 1166 (1982) from challenging the conveyance of land to the State of Alaska by sec. 906 of the Alaska National Interest Lands Conservation Act, confirming tentative approvals of State land selections subject to valid rights, where more than 6 years have passed since the conveyance. Since the lands here conveyed legislatively to the State were tentatively approved for conveyance in 1976, and since the Act makes such conveyance effective as of the date of tentative approval, provision of 43 U.S.C. § 1166 (1982) bars any possibility of Departmental intervention on behalf of the entryman in this case.

Terry L. Wilson, 85 IBLA 206 (Feb. 28, 1985)
92 I.D. 109

Sec. 14(h)(1) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613(h)(1) (1982), authorizes the Secretary of the Interior to withdraw and convey existing historical places and cemetery sites to the appropriate regional corporation. A historical site application is properly rejected where the subject land was withdrawn by Public Land Order No. 5180, pursuant to 43 U.S.C. § 1616(d)(1) (1982), or withdrawn by Public Land Order No. 5250, pursuant to 43 U.S.C. § 1616(d)(2) (1982).

Bering Straits Native Corp., 87 IBLA 96 (May 30, 1985)

Sec. 810(a) of the Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3120(a) (1982), provides for notice, hearing, and procedural requirements where certain agency actions "significantly restrict subsistence use." Where a decision which concludes subsistence use will not be significantly restricted has reasonable support in the record, the statute does not require a hearing to be conducted.

Tulkisarmute Native Community Council et al., 88 IBLA 210 (Aug. 28, 1985)

DUTY OF DEPARTMENT OF THE INTERIOR TO NATIVE ALLOTMENT APPLICANTS

Native allotment applications describing land in Alaska within a State selection application filed prior to Dec. 18, 1971, are generally excepted from the statutory approval afforded by sec. 905(a)(1) of the Alaska National Interest Lands Conservation Act and must be adjudicated under the provisions of the Alaska Native Allotment Act.

State of Alaska, 85 IBLA 196 (Feb. 27, 1985)

VALID EXISTING RIGHTS

The Department of the Interior does not retain jurisdiction to adjudicate the merits of a homestead entryman's claim that he has a valid existing right which is prior to that asserted by Alaska where the land sought by the entryman was tentatively approved for conveyance to the State of Alaska since

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--Continued

VALID EXISTING RIGHTS--Continued

sec. 906(c)(1) of the Alaska National Interest Lands Conservation Act legislatively confirmed all tentative approvals of state land selections, subject to valid existing rights, and conveyed the land in dispute out of Federal control.

Terry L. Wilson, 85 IBLA 206 (Feb. 28, 1985)
92 I.D. 109

ALASKA NATIVE CLAIMS SETTLEMENT ACT

CONVEYANCES

Generally

Where the subsurface mineral estate is severed from the surface estate, the owner of the mineral estate retains, either by the express terms of the conveyance or as a necessary implication therefrom, a right of entry or access to the minerals over or through the surface, absent an expressed intent to the contrary in the document creating the severance. Since no such contrary intent was manifested in the Alaska Native Claims Settlement Act, insofar as lands in Naval Petroleum Reserve No. 4, now NPR-A, are concerned, the Department of the Interior, as the present owner of the mineral estate, is vested with such right of entry or access independent of any contractual grant of access rights.

Kuuqpik Corp., 85 IBLA 366 (Mar. 26, 1985)

Cemetery Sites and Historical Places

Sec. 14(h)(1) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613(h)(1) (1982), authorizes the Secretary of the Interior to withdraw and convey existing historical places and cemetery sites to the appropriate regional corporation. A historical site application is properly rejected where the subject land was withdrawn by Public Land Order No. 5180, pursuant to 43 U.S.C. § 1616(d)(1) (1982), or withdrawn by Public Land Order No. 5250, pursuant to 43 U.S.C. § 1616(d)(2) (1982).

Bering Straits Native Corp., 87 IBLA 96 (May 30, 1985)

Easements

Sec. 17(b) of the Alaska Native Claims Settlement Act requires the Secretary, when approving a selection of lands by a Native corporation, to reserve such easements as are reasonably necessary to guarantee a full right of public access across selected lands to public lands not embraced in the selection. Where the evidence adduced at an evidentiary hearing shows that an easement does not qualify under sec. 17(b), BLM's decision seeking such an easement is properly reversed.

Chitina Native Corp., 85 IBLA 311 (Mar. 21, 1985)

Sec. 17(b) of the Alaska Native Claims Settlement Act requires the Secretary, when approving a selection of lands by a Native corporation, to reserve such easements as are reasonably necessary to guarantee a full right of public access across selected lands to public lands not embraced in the selection.

State of Alaska, 86 IBLA 263 (May 10, 1985)

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

CONVEYANCES--Continued

Easements--Continued

Sec. 17(b) of the Alaska Native Claims Settlement Act authorizes the Secretary, when issuing a conveyance for lands to a village corporation under sec. 19 of the Alaska Native Claims Settlement Act, to reserve such easements as are reasonably necessary to guarantee access to major waterways and publicly owned lands. BLM's reservation of a site easement for such purpose will not be disturbed in the absence of a showing that the BLM determination is erroneous.

Tetlin Native Corp., 86 IBLA 325 (May 16, 1985)

Where the Bureau of Land Management reserves a sec. 17(b) public easement over an existing road or trail claimed by the State of Alaska as an R.S. 2477 right-of-way, the conveyance documents shall contain a provision specifying that the reserved public easement is subject to the claimed R.S. 2477 right-of-way "if valid."

Alaska Dept. of Transportation, 88 IBLA 106 (July 23, 1985)

Interim Conveyance

An interim conveyance to a Native corporation under the Alaska Native Claims Settlement Act effectively conveys title to the land, subject to valid existing rights. A conflicting application based on settlement and occupancy maintained under laws leading to acquisition of title is properly excluded from an ANCSA conveyance. Where a conflicting application has been relinquished prior to conveyance, and hence was not excluded, the Department has no authority to reinstate the application pursuant to a request filed subsequent to the interim conveyance.

Kenai Natives Ass'n, Inc., 87 IBLA 58 (May 28, 1985)

Native Groups

A determination by the Bureau of Indian Affairs to issue a certificate of ineligibility to a Native corporation claiming status as a Native group under sec. 14(h)(2) of the Alaska Native Claims Settlement Act of 1971, 43 U.S.C. § 1613(h)(2) (1982) because the members of the corporation do not compose more than one family or household as required by 43 CFR 2653.6(a)(5) will be affirmed on appeal where the facts show that on the critical census date the four Native members were grandparents and two adult grandchildren, and that the living situation at the group locality was that of a single family or household with the grandfather as head of that family or household.

Deacon's Landing, Inc., 86 IBLA 340 (May 16, 1985)

A determination by the Bureau of Indian Affairs to deny a Native corporation status as a Native group because members of the group did not constitute a majority of the residents of the locality on Apr. 1, 1970, will be affirmed where it is based on a thorough field investigation, supported by numerous affidavits, and meets the criteria of 43 CFR 2653.6(a)(4).

Wisenak, Inc., 87 IBLA 67 (May 28, 1985)

Ahtna, Inc., 87 IBLA 283 (June 25, 1985)

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

CONVEYANCES--Continued

Valid Existing Rights

Third-Party Interests

BLM's waiver of its right to continue to administer leases, contracts, permits, rights-of-way, and easements to the extent they encumber land which has since been conveyed to Alaska Native corporations has the effect of transferring the responsibility and authority for such administration to the grantee corporation. Where all of the land occupied by such an outstanding third-party interest has been so conveyed, BLM must waive its administration of such interests as mandated by 43 CFR 2650.4-3, absent a Secretarial finding that retention of that function is in the interest of the United States. BLM policy favoring partial waivers in most instances appears to comport well with the public interest and will not be disturbed by the Board merely because the State of Alaska would prefer to preserve the status quo.

State of Alaska, 86 IBLA 268 (May 10, 1985)

Village Conveyances

Under sec. 3(e) of ANCSA, as amended, 43 U.S.C. § 1602(e) (1982), BLM may properly exclude land actually used in connection with the administration of a Federal installation during the period of time the land was available for selection by the Native village corporation from an interim conveyance to a Native village corporation under sec. 16(b) of ANCSA, as amended, 43 U.S.C. § 1615(b) (1982).

Pursuant to 43 CFR 2655.2(b)(3)(v), a tract of land used by private logging interests under a permit issued by the Forest Service is excludable from interim conveyance to a Native village corporation under sec. 3(e) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1602(e) (1982), if the use of the land has a direct, necessary, and substantial connection to the purpose of the holding agency and the lands are not used primarily to derive revenue.

Kake Tribal Corp., 85 IBLA 165 (Feb. 25, 1985)

EASEMENTS

Generally

When considering whether to reserve an easement across a Native land selection made pursuant to the Alaska Native Claims Settlement Act, the Department must consider, in addition to matters relating to the utility of the easement for the use sought, the impact of the reservation upon the Native corporation. The practicability of the use of other, non-Native lands as alternative easement sites must be considered. Such consideration should include the evaluation of alternative means to obtain the easement sought, including possible licensing arrangements proposed by the Native corporation.

In considering whether to reserve a transportation easement across a Native corporation's land selection made under the Alaska Native Claims Settlement Act, the Department must not restrict consideration of alternate access to sites which have existing actual road access.

An evidentiary hearing is properly ordered to receive further evidence concerning suitable alternative sites for a transportation easement where the record is inadequate to support a finding that there are no suitable alternative easement sites providing similar access.

Goldbelt, Inc., 85 IBLA 273 (Mar. 12, 1985)

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

EASEMENTS--Continued

Generally--Continued

Where the Bureau of Land Management reserves a sec. 17(b) public easement over an existing road or trail claimed by the State of Alaska as an R.S. 2477 right-of-way, the conveyance documents shall contain a provision specifying that the reserved public easement is subject to the claimed R.S. 2477 right-of-way "if valid."

Alaska Dept. of Transportation, 88 IBLA 106 (July 23, 1985)

Access

Sec. 17(b) of the Alaska Native Claims Settlement Act requires the Secretary, when approving a selection of lands by a Native corporation, to reserve such easements as are reasonably necessary to guarantee a full right of public access across selected lands to public lands not embraced in the selection. Where the evidence adduced at an evidentiary hearing shows that an easement does not qualify under sec. 17(b), BLM's decision seeking such an easement is properly reversed.

Chitina Native Corp., 85 IBLA 311 (Mar. 21, 1985)

Sec. 17(b) of the Alaska Native Claims Settlement Act requires the Secretary, when approving a selection of lands by a Native corporation, to reserve such easements as are reasonably necessary to guarantee a full right of public access across selected lands to public lands not embraced in the selection.

Pursuant to 43 CFR 2650.4-7(a)(3), an easement for public access may not be reserved across Native lands where there exists a reasonable alternative route of transportation across publicly owned lands. Where the reasonableness of an alternative route decided upon by BLM is challenged on appeal and the facts of record are insufficient to determine whether BLM's decision should be affirmed, this Board has the discretionary authority to order a hearing in the matter before an Administrative Law Judge, pursuant to 43 CFR 4.415.

State of Alaska, 86 IBLA 263 (May 10, 1985)

Decision to Reserve

Sec. 17(b) of the Alaska Native Claims Settlement Act authorizes the Secretary, when issuing a conveyance for lands to a village corporation under sec. 19 of the Alaska Native Claims Settlement Act, to reserve such easements as are reasonably necessary to guarantee access to major waterways and publicly owned lands. BLM's reservation of a site easement for such purpose will not be disturbed in the absence of a showing that the BLM determination is erroneous.

Tetlin Native Corp., 86 IBLA 325 (May 16, 1985)

Present Existing Use

Pursuant to 43 CFR 2650.4-7(a)(3), the primary standard for determining which public easements are reasonably necessary for access shall be present existing use. The established interpretation of the "present existing use" requirement is that easements substantially conform to existing uses and that evidence of such use be recent.

State of Alaska, 86 IBLA 263 (May 10, 1985)

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

EASEMENTS--Continued

Public Easements

Sec. 17(b) of the Alaska Native Claims Settlement Act requires the Secretary, when approving a selection of lands by a Native corporation, to reserve such easements as are reasonably necessary to guarantee a full right of public access across selected lands to public lands not embraced in the selection. Where the evidence adduced at an evidentiary hearing shows that an easement does not qualify under sec. 17(b), BLM's decision seeking such an easement is properly reversed.

Chitina Native Corp., 85 IBLA 311 (Mar. 21, 1985)

Sec. 17(b) of the Alaska Native Claims Settlement Act requires the Secretary, when approving a selection of lands by a Native corporation, to reserve such easements as are reasonably necessary to guarantee a full right of public access across selected lands to public lands not embraced in the selection.

Pursuant to 43 CFR 2650.4-7(a)(3), an easement for public access may not be reserved across Native lands where there exists a reasonable alternative route of transportation across publicly owned lands. Where the reasonableness of an alternative route decided upon by BLM is challenged on appeal and the facts of record are insufficient to determine whether BLM's decision should be affirmed, this Board has the discretionary authority to order a hearing in the matter before an Administrative Law Judge, pursuant to 43 CFR 4.415.

State of Alaska, 86 IBLA 263 (May 10, 1985)

Review

When a party appeals a BLM easement determination made pursuant to ANCSA and Department regulations, the burden of proof is upon the party challenging the determination to show that the decision is erroneous.

State of Alaska, 86 IBLA 263 (May 10, 1985)

NATIVE LAND SELECTIONS

Selection Limitations

Under sec. 3(e) of ANCSA, as amended, 43 U.S.C. § 1602(e) (1982), BLM may properly exclude land actually used in connection with the administration of a Federal installation during the period of time the land was available for selection by the Native village corporation from an interim conveyance to a Native village corporation under sec. 16(b) of ANCSA, as amended, 43 U.S.C. § 1615(b) (1982).

Pursuant to 43 CFR 2655.2(b)(3)(v), a tract of land used by private logging interests under a permit issued by the Forest Service is excludable from interim conveyance to a Native village corporation under sec. 3(e) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1602(e) (1982), if the use of the land has a direct, necessary, and substantial connection to the purpose of the holding agency and the lands are not used primarily to derive revenue.

Kake Tribal Corp., 85 IBLA 165 (Feb. 25, 1985)

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

NATIVE LAND SELECTIONS--Continued

Village Selections

Where the facts and law are comprehensively set forth in an Administrative Law Judge's decision recommending reversal of easements reserved under authority of sec. 17(b) of the Alaska Native Claims Settlement Act, the recommended decision may be adopted as the final decision of the Board.

Chitina Native Corp., 85 IBLA 311 (Mar. 21, 1985)

Where the facts and the law are properly set forth in an Administrative Law Judge's decision recommending affirming a BLM decision to reserve a site easement pursuant to sec. 17(b) of the Alaska Native Claims Settlement Act, the recommended decision may be adopted as the final decision of the Board.

Tetlin Native Corp., 86 IBLA 325 (May 16, 1985)

Land occupied and actually used as a school by the Bureau of Indian Affairs, reduced to the smallest practicable tract, is not "public land" within the definition of sec. 3(e) of ANCSA, and thus is not available for village selection even though it may be anticipated that the school will be "phased out" at some future time.

Nunakauiak Yupik Corp., 87 IBLA 313 (June 25, 1985)

WITHDRAWALS AND RESERVATIONS

Generally

Under sec. 3(e) of ANCSA, as amended, 43 U.S.C. § 1602(e) (1982), BLM may properly exclude land actually used in connection with the administration of a Federal installation during the period of time the land was available for selection by the Native village corporation from an interim conveyance to a Native village corporation under sec. 16(b) of ANCSA, as amended, 43 U.S.C. § 1615(b) (1982).

Pursuant to 43 CFR 2655.2(b)(3)(v), a tract of land used by private logging interests under a permit issued by the Forest Service is excludable from interim conveyance to a Native village corporation under sec. 3(e) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1602(e) (1982), if the use of the land has a direct, necessary, and substantial connection to the purpose of the holding agency and the lands are not used primarily to derive revenue.

Kake Tribal Corp., 85 IBLA 165 (Feb. 25, 1985)

APPEALS

Under 43 CFR 4.1271(a), a party may not file a "notice of appeal" with the Board of Land Appeals from an order or decision of an Administrative Law Judge disposing of a civil penalty proceeding. Instead, any party seeking review of an order or decision in a civil penalty proceeding may file a petition for discretionary review with the Board under 43 CFR 4.1158 and 4.1270.

Tri Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 85 IBLA 146 (Feb. 21, 1985)

APPEALS--Continued

As an appellate tribunal, the Board of Land Appeals may not make initial adjudicatory decisions on matters which should properly be submitted to and decided by BLM, nor does the Board render advisory opinions.

Edgar W. White, 85 IBLA 161 (Feb. 25, 1985)

Where the State of Alaska appeals a decision holding that a Native allotment is not subject to a right-of-way granted to the State and on appeal the heirs of the allottee relinquish that part of the allotment in conflict with the right-of-way, the issue is moot and the appeal is dismissed.

As an appellate tribunal, the Board of Land Appeals may not make initial adjudicatory decisions on matters which properly should be submitted to and decided by BLM, nor does the Board render advisory opinions or opinions in hypothetical cases.

State of Alaska, 85 IBLA 170 (Feb. 26, 1985)

The holder of a right-of-way on lands administered by the Bureau of Land Management is not adversely affected within the meaning of 43 CFR 4.410 by a decision transferring administrative authority over such lands to the Forest Service in the absence of any allegations of facts showing that the Forest Service has taken any adverse action with respect to the right-of-way at issue.

James W. Smith, 85 IBLA 237 (Mar. 4, 1985)

An appeal brought by a person who does not fall within the categories of persons authorized by regulation to practice before the Department is subject to dismissal.

Ganawas Corp., 85 IBLA 250 (Mar. 6, 1985)

Regulation 43 CFR 4.410, setting forth the standard regarding who may appeal to the Board of Land Appeals, contains two separate and discrete prerequisites: (1) that appellant be a party to the case, and (2) that appellant be adversely affected by the decision on appeal. Denial of a protest makes an individual a party to a case. Such denial, however, does not necessarily establish that an individual is adversely affected. Rather, an unsuccessful protestant must show that a legally cognizable interest has been adversely affected by denial of the protest.

Donald Fay, 85 IBLA 283 (Mar. 13, 1985)

Where, on appeal from a denial of a protest, an appellant fails to make any showing as to how its interests are adversely affected by the denial of the protest, and none is apparent, such an appellant will be deemed to lack standing, and the appeal will be dismissed.

Save Our ecoSystems, Inc., et al., 85 IBLA 300 (Mar. 15, 1985)

Where a mining claimant appeals from an Administrative Law Judge's decision holding his claims invalid and makes vague assertions that prejudicial evidence was admitted at the hearing; that his expert witness was not permitted to testify that the claims could be mined profitably; and that the transcript was inadequate and incorrect, but offers no evidence to

APPEALS--Continued

substantiate the assertions, such assertions will not serve as a basis for setting aside the Judge's decision.

United States v. Clyde L. Weekley, 86 IBLA 1 (Mar. 29, 1985)

A hearing is not necessary in the absence of a material issue of fact, which, if proven, would alter the disposition of the matter. A hearing is not necessary where the dispute does not involve facts, but involves the proper application and interpretation of those facts, and the Bureau of Land Management properly reviewed the same information submitted to this Board.

Woods Petroleum Co., 86 IBLA 46 (Apr. 10, 1985)

Where a party appeals the BLM issuance of special recreation use permits, it is the obligation of appellant to show that the determinations to issue the permits are erroneous. Unless a statement of reasons shows adequate basis for appeal and the allegations are supported with evidence showing error, the appeals cannot be afforded favorable consideration.

Mendocino County Tax-Payers Land Use Committee, 86 IBLA 319 (May 16, 1985)

A decision denying a protest of the contemplated ssuance of noncompetitive geothermal resources leases will not be effective during the period of time in which the protestant adversely affected by the decision may file a notice of appeal, and leases issued during this time are subject to cancellation.

Sierra Club, Oregon Chapter, 87 IBLA 1 (May 17, 1985)

Notice of appeal must be filed within 30 days after the person taking the appeal is served with the decision from which the appeal is taken. The timely filing of a notice of appeal is jurisdictional and failure to file the appeal within the time allowed requires dismissal of the appeal.

Oscar Mineral Group #3, 87 IBLA 48 (May 23, 1985)

An appeal brought by a person who does not fall within any of the categories of persons authorized by regulation to practice before the Department is subject to dismissal. Where the record does not show the party presenting the appeal is qualified under the regulations, the appeal will be dismissed.

Robert G. Young, 87 IBLA 249 (June 20, 1985)

APPLICATIONS AND ENTRIES

GENERALLY

Where an application for a special use permit is filed after a deadline imposed by the Bureau of Land Management for compelling administrative reasons, the application is properly rejected.

Ken Warren Outdoors, Inc., 85 IBLA 354 (Mar. 25, 1985)

APPRAISALS

Where the reasonable rental value of Government-furnished quarters has been determined in accordance with accepted appraisal procedures pursuant to Departmental directives, and the occupant alleges that his rent is excessive, the burden is on the occupant to prove by positive, specific, and substantial evidence that the appraisal is in error.

Appeal of James P. Glynn, 6 OHA 13 (Feb. 6, 1985)

Where the proponent of a land exchange raises substantial questions concerning the accuracy of a BLM appraisal of the value of the selected land, including the use of appropriate comparable sales, the need to apply a discount to financed transactions and the extent of adjustments to assure comparability for the cost of bringing in utilities and modifying topography, the case will be referred to the Hearings Division for a fact-finding hearing.

Fallon Ice & Cold Storage Co., Willow Lane Corp., 85 IBLA 224 (Feb. 28, 1985)

Where the Bureau of Land Management proposes to resolve the conflicts and inconsistencies in its appraisal method used to determine fair market rental values for natural gas pipeline rights-of-way, granted pursuant to the Act of Feb. 25, 1920, as amended, 30 U.S.C. § 185 (1982), the Board will set aside decisions based on the going rate method of appraisal, and remand such questions to the Bureau of Land Management for further action consistent with the result of BLM's analysis.

BLM's right to reappraise every 5 years a right-of-way issued pursuant to sec. 28 of the Act of Feb. 25, 1920, 30 U.S.C. § 185 (1982), is but one factor that BLM has considered in arriving at an adjusted going rate for BLM rights-of-way. BLM's adjusted going rate is calculated by reducing by 30 percent the industry going rate for rights-of-way on private lands.

Gas Co. of New Mexico, 88 IBLA 240 (Sept. 3, 1985)

BOARD OF INDIAN APPEALS

JURISDICTION

The Board will exercise its jurisdiction in a matter appealed to it under 25 CFR 2.19(b) only after an appellant has filed with it a notice of appeal, request for the Board to assume jurisdiction, or other appropriate document advising the Board that the 30-day period has expired without decision. The date of filing the notice of appeal is, under 43 CFR 4.310(a), the date the notice is mailed.

Confusion would obviously result if two offices within the Department were to exercise simultaneous jurisdiction over the same persons and subject matter. Therefore, one of the two offices must be determined to have priority, in accordance with Departmental policy.

By informing the Board of Indian Appeals and the parties in writing that he is exercising his reserved authority under 43 CFR 4.5 to take jurisdiction over a case, the Secretary can avoid the potential problems that are likely to result from the simultaneous exercise of jurisdiction by two Departmental offices.

Interim Ad Hoc Committee of the Karok Tribe v. Area Director, Sacramento Area Office, Bureau of Indian Affairs, 13 IBIA 76 (Jan. 8, 1985) 92 I.D. 46

BOARD OF INDIAN APPEALS--Continued

JURISDICTION--Continued

The Board of Indian Appeals does not have authority to change a duly promulgated regulation of the Department or to declare it to be invalid.

Harold Jones v. Acting Area Director, Sacramento Area Office, Bureau of Indian Affairs, 13 IBIA 124 (Feb. 27, 1985)

BOARD OF LAND APPEALS

As an appellate tribunal, the Board of Land Appeals may not make initial adjudicatory decisions on matters which should properly be submitted to and decided by BLM, nor does the Board render advisory opinions.

Edgar W. White, 85 IBLA 161 (Feb. 25, 1985)

As an appellate tribunal, the Board of Land Appeals may not make initial adjudicatory decisions on matters which properly should be submitted to and decided by BLM, nor does the Board render advisory opinions or opinions in hypothetical cases.

State of Alaska, 85 IBLA 170 (Feb. 26, 1985)

While it is within the province of the judicial branch to adjudicate the constitutionality of statutes, it is outside the jurisdiction of the Board. The legislative history of the Act of July 6, 1960, 74 Stat. 334 (Sisk Act) shows Congress fully considered the constitutionality of the compensation provisions therein. The Department is bound to follow those provisions.

Frederick Siemon, 86 IBLA 149 (Apr. 25, 1985)

BUREAU OF INDIAN AFFAIRS

ADMINISTRATIVE APPEALS

Generally

Administrative appeals within the Bureau of Indian Affairs are normally decided by the Deputy Assistant Secretary--Indian Affairs (Operations) under authority delegated from the Assistant Secretary for Indian Affairs. If, however, the Assistant Secretary considers an appeal in place of the Deputy Assistant Secretary, he is subject to the 30-day period for decision set forth in 25 CFR 2.19.

Confusion would obviously result if two offices within the Department were to exercise simultaneous jurisdiction over the same persons and subject matter. Therefore, one of the two offices must be determined to have priority, in accordance with Departmental policy.

Interim Ad Hoc Committee of the Karok Tribe v. Area Director, Sacramento Area Office, Bureau of Indian Affairs, 13 IBIA 76 (Jan. 8, 1985) 92 I.D. 46

BUREAU OF INDIAN AFFAIRS--Continued

ADMINISTRATIVE APPEALS--Continued

Generally--Continued

Field and area offices of the Bureau of Indian Affairs do not have authority to overturn decisions of the Deputy Assistant Secretary--Indian Affairs (Operations).

Patricia Ann Schoolcraft Patencio v. Area Director, Sacramento Area Office, Bureau of Indian Affairs, 13 IBIA 150 (May 21, 1985)

BUREAU OF LAND MANAGEMENT

When the Bureau of Land Management cites an oil and gas lessee for an incident of noncompliance for a safety violation, the failure to have a belt guard on a pumpjack, the Bureau of Land Management may not assess the lessee a penalty for noncompliance if the lessee, acting in good faith, has complied timely with the terms of the order and if the purpose of the order, ensuring safety, has been fulfilled. No penalty will be imposed where the cited "hazard" is so minimal that the risk of actual harm is virtually nonexistent.

Chinook Resources, Inc., 85 IBLA 5 (Jan. 30, 1985)

BLM may properly rely on public hearings conducted, and adopt past and future decisions rendered by a State board with respect to oil and gas conservation within Indian lands where BLM retains the ultimate jurisdiction to approve such decisions and, in fact, exercises an independent review function prior to such adoption.

Assiniboine & Sioux Tribes, 85 IBLA 39 (Feb. 5, 1985)

It is premature for the Bureau of Land Management to reject petition/applications for desert land entries merely on the basis of informal information and belief that the State water authority will probably deny the applicants the right to appropriate groundwater for irrigation of the entries where the water authority has taken no official action on the water applications pending before it.

Julie A. Peterson et al., 86 IBLA 118 (Apr. 15, 1985)

BLM has the authority to decide whether to issue a noncompetitive geothermal resources lease pursuant to sec. 3 of the Geothermal Steam Act of 1970, 30 U.S.C. § 1002 (1982), for land within a national forest where the Forest Service has consented to leasing, and to impose additional stipulations, in order to protect environmental resources, not inconsistent with those prescribed by the Forest Service. Where BLM has expressly not exercised that authority, the case will be remanded for that purpose, including a consideration of whether BLM has properly provided for staged leasing, i.e., leasing subject to subsequent approval of specific development activities contingent on a finding that no environmentally unacceptable impact will occur.

Sierra Club, Oregon Chapter, 87 IBLA 1 (May 17, 1985)

BLM has the authority to issue notices of incidents of noncompliance, e.g., for failure to regravel an access road and to remove reserve pit fluids, and to levy an assessment under 43 CFR 3163.3 (1983) with respect to the operation of oil and gas wells on

BUREAU OF LAND MANAGEMENT--Continued

Federal noncompetitive oil and gas leases within a national forest.

Where BLM has issued a decision which levied an assessment for noncompliance with a previous order with respect to the operation of oil and gas wells on noncompetitive oil and gas leases and has afforded the lessee a technical and procedural review in accordance with 43 CFR 3165.3, the decision of that official is binding.

Riviera Drilling & Exploration, 87 IBLA 357 (June 27, 1985)

BUREAU OF RECLAMATION

GENERALLY

While the general Departmental policy is not to suspend oil and gas lease offers to await possible future leasing of lands, the policy is not without exception. Where circumstances warrant suspension and suspension is not precluded by 43 CFR 2091.1, oil and gas lease offers for acquired lands in the Nueces River Project under the jurisdiction of the Bureau of Reclamation may be suspended until the Bureau of Reclamation has completed its oil and gas management plan for that area.

Dinero Oil Corp., 84 IBLA 394 (Jan. 28, 1985)

Under the Mineral Leasing Act for Acquired Lands of 1947, as amended, 30 U.S.C. §§ 351-359 (1982), if the lands embraced within an oil and gas lease application are under surface jurisdiction of a service or bureau within the Department of the Interior, such as the Bureau of Reclamation, the consent of the Secretary of the Interior is necessary under the Act for leasing of the land.

Robert J. Shorney, 88 IBLA 61 (July 22, 1985)

COAL LEASES AND PERMITS

CANCELLATION

Bureau of Land Management may not cancel a competitive coal lease by administrative action, but must institute an appropriate judicial proceeding under 30 U.S.C. § 188(a) (1982) where, subsequent to lease issuance, the lessee failed to pay timely an installment of the deferred bonus bid, and the annual rental as required by the lease which failure constituted cause for cancellation.

Apex Mining Co., Inc., Jerry W. Williams, 86 IBLA 242 (Apr. 30, 1985)

LEASES

Where a coal lessee is notified of the terms and conditions of the coal lease upon modification and is informed of the effective date assigned to the lease, such lessee must timely object or thereafter be barred from arguing the propriety of the modified lease's terms and conditions.

AMCA Coal Leasing, Inc., 86 IBLA 21 (Mar. 29, 1985)

COAL LEASES AND PERMITS--Continued

LEASES--Continued

Pursuant to 30 U.S.C. § 207(a) (1982) and 43 CFR Subpart 3451, the Secretary is vested with broad discretionary authority to readjust every term or condition of a coal lease. A lessee of a pre-Federal Coal Leasing Amendments Act lease has no vested rights to the indefinite continuation of existing lease terms.

Where a notice of intent to readjust a coal lease is given to a lessee prior to expiration of the period allowed for readjustment, such notice satisfies the statutory requirements, and the Bureau of Land Management may subsequently provide the specific terms or conditions for readjustment.

The Federal Coal Leasing Amendments Act, 30 U.S.C. §§ 201-209 (1982), governs the terms and conditions that the Department may impose upon readjustment of leases issued prior to the Act.

A decision by the Bureau of Land Management to readjust a coal lease will be affirmed where the readjusted provisions appealed by the lessee are mandated by statute or regulation, or where such provisions are in accordance with proper administration of the public lands.

Consolidation Coal Co., Chevron Coal Development Co., 86 IBLA 60 (Apr. 10, 1985)

BLM is not barred from readjusting the terms and conditions of a coal lease issued prior to enactment of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 201 (1982), in accordance with the requirements of the statute and its implementing regulations, where a notice of intent to readjust is transmitted prior to the end of the 20-year period that follows lease issuance.

When the Department of the Interior readjusts a lease that was issued prior to the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 201 (1982), it must do so in conformity with the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 181 (1982).

A BLM decision to readjust the terms and conditions of a coal lease to include additional requirements will be affirmed where the requirements are mandated by statute or regulation, or are in accordance with proper administration of the land.

Ark Land Co., 86 IBLA 153 (Apr. 25, 1985)

The Bureau of Land Management may properly conform a competitive coal lease to set forth the specific deferred bonus bid and schedule for payment in accordance with the terms of the lease sale. By submitting its bid, the lessee has already agreed to such a deferred bonus bid payment where the term was included in the detailed statement of the lease sale and was incorporated into the contract upon acceptance of the bid and subsequent lease issuance.

Apex Mining Co., Inc., Jerry W. Williams, 86 IBLA 242 (Apr. 30, 1985)

In order to be eligible for addition to a coal lease by modification under 30 U.S.C. § 203 (1982), coal lands or coal deposits must be contiguous to or corner on those contained in the base lease. A decision rejecting an application for modification will be affirmed where the coal deposit is not contiguous, i.e., does not have at least one point in common with the coal deposit in the base lease.

Gulf Oil Corp., Republic Steel Corp., 87 IBLA 109 (May 31, 1985)

COAL LEASES AND PERMITS--Continued

LEASES--Continued

A decision by the Bureau of Land Management to readjust a coal lease will be affirmed where the readjusted provisions appealed by the lessee are mandated by statute or regulation, or where such provisions are in accordance with proper administration of the public lands.

A provision in a readjusted coal lease requiring the lessee to conduct operations so as to avoid or, where avoidance is impracticable, to minimize and, where practicable, to repair, damage to Federal forage and timber, improvements including crops, of a surface owner, and improvements owned by the United States or by its permittees, licensees, or lessees, is appropriate and properly included in a lease readjustment.

It is proper to include a provision in a readjusted coal lease which reserves to the United States the right to authorize other uses of the leased lands that do not unreasonably interfere with the exploration and mining operations of the lessee, since any authorized use would be subject to the lease.

It is proper to include in a readjusted coal lease a provision requiring the lessee to conduct at its own expense a survey and inventory of archaeological and paleontological values prior to approval of a mining plan or any activity that would disturb the surface of the land.

Kaiser Steel Corp., 87 IBLA 228 (June 19, 1985)

A Federal coal lease which is subject to readjustment subsequent to enactment of the Federal Coal Leasing Amendments Act, 30 U.S.C. §§ 201-209 (1982), will be conformed upon readjustment to the terms required by that statute.

Regulation 43 CFR 3451.1(c)(1) specifically provides that a notice of readjustment or notice of intent to readjust must be given to the lessee at or before the expiration of the initial 20-year period for leases issued prior to Aug. 4, 1976. Where BLM fails to provide such notice to a lessee holding a 50-percent undivided interest in a lease and the record indicates the lessee did not have actual knowledge of BLM's intent to readjust on or before the anniversary date of the lease, the lease may not be readjusted.

Consolidation Coal Co., Gulf Oil Corp., 87 IBLA 296 (June 25, 1985)

READJUSTMENT

Pursuant to 30 U.S.C. § 207(a) (1982) and 43 CFR Subpart 3451, the Secretary is vested with broad discretionary authority to readjust every term or condition of a coal lease. A lessee of a pre-Federal Coal Leasing Amendments Act lease has no vested rights to the indefinite continuation of existing lease terms.

Where a notice of intent to readjust a coal lease is given to a lessee prior to expiration of the period allowed for readjustment, such notice satisfies the statutory requirements, and the Bureau of Land Management may subsequently provide the specific terms or conditions for readjustment.

The Federal Coal Leasing Amendments Act, 30 U.S.C. §§ 201-209 (1982), governs the terms and conditions that the Department may impose upon readjustment of leases issued prior to the Act.

A decision by the Bureau of Land Management to readjust a coal lease will be affirmed where the readjusted provisions appealed by the lessee are mandated by statute or regulation, or where such provisions are in accordance with proper administration of the public lands.

COAL LEASES AND PERMITS--Continued

READJUSTMENT--Continued

Consolidation Coal Co., Chevron Coal Development Co., 86 IBLA 60 (Apr. 10, 1985)

BLM is not barred from readjusting the terms and conditions of a coal lease issued prior to enactment of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 201 (1982), in accordance with the requirements of the statute and its implementing regulations, where a notice of intent to readjust is transmitted prior to the end of the 20-year period that follows lease issuance.

When the Department of the Interior readjusts a lease that was issued prior to the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 201 (1982), it must do so in conformity with the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 181 (1982).

A BLM decision to readjust the terms and conditions of a coal lease to include additional requirements will be affirmed where the requirements are mandated by statute or regulation, or are in accordance with proper administration of the land.

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A Federal coal lease which is subject to readjustment subsequent to enactment of the Federal Coal Leasing Amendments Act, 30 U.S.C. §§ 201-209 (1982), will be conformed upon readjustment to the terms required by that statute.

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Consolidation Coal Co., Gulf Oil Corp., 87 IBLA 296 (June 25, 1985)

COLOR OR CLAIM OF TITLE

GENERALLY

The obligation for proving a valid color-of-title claim is upon the applicant. A failure to carry the burden of proof with respect to any one of the elements for a color-of-title claim is fatal to the application.

Middle Rio Grande Conservancy District, 86 IBLA 41 (Apr. 9, 1985)

An application for a patent under the Act of Aug. 24, 1954, commonly known as the O'Konski Act, 43 U.S.C. § 1221 (1982), is properly rejected where the applicant fails to establish that the land lies between the meander line of an inland lake or river in Wisconsin as originally surveyed and the meander line of that lake or river as subsequently resurveyed.

COLOR OR CLAIM OF TITLE--Continued

GENERALLY--Continued

Applicants for a patent under 43 U.S.C. § 1221 (1982) have the burden of proving each of the requirements for patent to the satisfaction of the Secretary of the Interior.

Finley F. Martin, John C. Martin, 86 IBLA 254 (May 3, 1985)

The burden of establishing a valid color-of-title claim is on the claimant.

An applicant who believes or has reason to believe that title to land is in the United States at the time when he acquires it does not hold color of title in good faith.

William T. Bertagnole, 87 IBLA 34 (May 23, 1985)

The burden of proving a valid class 1 color-of-title claim is upon the applicants. A color-of-title application is properly rejected where the applicants claim a chain of title originating with a conveyance executed subsequent to a withdrawal for Federal purposes and within 20 years of the time the applicants learned of the title defect.

Grant F. & Jessie Fern Woodward, 87 IBLA 118 (May 31, 1985)

APPLICATIONS

BLM may properly reject a class 1 color-of-title application filed pursuant to the Color of Title Act, as amended, 43 U.S.C. § 1068 (1982), where the applicant fails to establish that, at the time his application was filed, the land either contained valuable improvements or had been reduced to cultivation.

Jerry G. Perry, 85 IBLA 93 (Feb. 14, 1985)

BLM may properly reject a color-of-title application filed pursuant to sec. 1 of the Color of Title Act, as amended, 43 U.S.C. § 1068 (1982), where the applicant claims chain of title originating with a certificate of tax sale to the county, executed prior to the withdrawal for Federal purposes. A certificate of tax sale does not constitute a conveyance and does not establish color of title because the right of redemption had not expired and there can be no adverse possession.

Richard F. Christensen, 85 IBLA 108 (Feb. 14, 1985)

The obligation for proving a valid color-of-title claim is upon the applicant. A failure to carry the burden of proof with respect to any one of the elements for a color-of-title claim is fatal to the application.

An application for a class 1 color-of-title claim made pursuant to the Color of Title Act, 43 U.S.C. § 1068 (1982), requires that the land be adversely held in good faith for at least 20 years by the claimant or its predecessors-in-title. Acquiring title to Federal lands by tax deed initiates a new title for the purpose of determining when possession under color of title commenced. A certificate of tax sale for a period preceding execution of the tax deed does not establish a color-of-title right transferable to the grantee of the tax deed where a right of redemption continued in

COLOR OR CLAIM OF TITLE--Continued

APPLICATIONS--Continued

effect because there can be no adverse possession in such case.

To establish a class 1 color-of-title application filed under the Color of Title Act, 43 U.S.C. § 1068 (1982), claimed improvements must enhance the value of the land or the land must be reduced to cultivation at the time defective title became known and the application was filed.

Middle Rio Grande Conservancy District, 86 IBLA 41 (Apr. 9, 1985)

An application for a patent under the Act of Aug. 24, 1954, commonly known as the Wisconsin Act, 43 U.S.C. § 1221 (1982), is properly rejected where the applicant fails to establish that the land lies between the meander line of an inland lake or river in Wisconsin as originally surveyed and the meander line of that lake or river as subsequently resurveyed.

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The burden of proving a valid class 1 color-of-title claim is upon the applicants. A color-of-title application is properly rejected where the applicants claim a chain of title originating with a conveyance executed subsequent to a withdrawal for Federal purposes and within 20 years of the time the applicants learned of the title defect.

Grant F. & Jessie Fern Woodward, 87 IBLA 118 (May 31, 1985)

CULTIVATION

BLM may properly reject a class 1 color-of-title application filed pursuant to the Color of Title Act, as amended, 43 U.S.C. § 1068 (1982), where the applicant fails to establish that, at the time his application was filed, the land either contained valuable improvements or had been reduced to cultivation.

Jerry G. Perry, 85 IBLA 93 (Feb. 14, 1985)

To establish a class 1 color-of-title application filed under the Color of Title Act, 43 U.S.C. § 1068 (1982), claimed improvements must enhance the value of the land or the land must be reduced to cultivation at the time defective title became known and the application was filed.

Middle Rio Grande Conservancy District, 86 IBLA 41 (Apr. 9, 1985)

COLOR OR CLAIM OF TITLE--Continued

GOOD FAITH

An application for a class 1 color-of-title claim made pursuant to the Color of Title Act, 43 U.S.C. § 1068 (1982), requires that the land be adversely held in good faith for at least 20 years by the claimant or its predecessors-in-title. Acquiring title to Federal lands by tax deed initiates a new title for the purpose of determining when possession under color of title commenced. A certificate of tax sale for a period preceding execution of the tax deed does not establish a color-of-title right transferable to the grantee of the tax deed where a right of redemption continued in effect because there can be no adverse possession in such case.

Middle Rio Grande Conservancy District, 86 IBLA 41 (Apr. 9, 1985)

An applicant who believes or has reason to believe that title to land is in the United States at the time when he acquires it does not hold color of title in good faith.

Good faith under the Color of Title Act requires that the claimants and their predecessors in interest honestly believe themselves seized of the title, and the Department may consider whether such a belief was unreasonable in light of the facts actually known or available to the claimants or a predecessor. However, undocumented hearsay evidence, indicating a lack of good faith because some people in the community are aware of the title being in the Federal Government, will not overcome substantial and documented evidence that the applicant acted in the good faith belief that he was seized of title.

William T. Bertagnole, 87 IBLA 34 (May 23, 1985)

The burden of proving a valid class 1 color-of-title claim is upon the applicants. A color-of-title application is properly rejected where the applicants claim a chain of title originating with a conveyance executed subsequent to a withdrawal for Federal purposes and within 20 years of the time the applicants learned of the title defect.

Grant F. & Jessie Fern Woodward, 87 IBLA 118 (May 31, 1985)

IMPROVEMENTS

BLM may properly reject a class 1 color-of-title application filed pursuant to the Color of Title Act, as amended, 43 U.S.C. § 1068 (1982), where the applicant fails to establish that, at the time his application was filed, the land either contained valuable improvements or had been reduced to cultivation.

Jerry G. Perry, 85 IBLA 93 (Feb. 14, 1985)

To establish a class 1 color-of-title application filed under the Color of Title Act, 43 U.S.C. § 1068 (1982), claimed improvements must enhance the value of the land or the land must be reduced to cultivation at the time defective title became known and the application was filed.

Middle Rio Grande Conservancy District, 86 IBLA 41 (Apr. 9, 1985)

COLOR OR CLAIM OF TITLE--Continued

PRIVITY

An application for a class 1 color-of-title claim made pursuant to the Color of Title Act, 43 U.S.C. § 1068 (1982), requires that the land be adversely held in good faith for at least 20 years by the claimant or its predecessors-in-title. Acquiring title to Federal lands by tax deed initiates a new title for the purpose of determining when possession under color of title commenced. A certificate of tax sale for a period preceding execution of the tax deed does not establish a color-of-title right transferable to the grantee of the tax deed where a right of redemption continued in effect because there can be no adverse possession in such case.

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The burden of proving a valid class 1 color-of-title claim is upon the applicants. A color-of-title application is properly rejected where the applicants claim a chain of title originating with a conveyance executed subsequent to a withdrawal for Federal purposes and within 20 years of the time the applicants learned of the title defect.

Grant F. & Jessie Fern Woodward, 87 IBLA 118 (May 31, 1985)

CONSTITUTIONAL LAW

GENERALLY

While it is within the province of the judicial branch to adjudicate the constitutionality of statutes, it is outside the jurisdiction of the Board. The legislative history of the Act of July 6, 1960, 74 Stat. 334 (Sisk Act) shows Congress fully considered the constitutionality of the compensation provisions therein. The Department is bound to follow those provisions.

Frederick Siemon, 86 IBLA 149 (Apr. 25, 1985)

The Supreme Court has definitively established in United States v. Locke, 53 U.S.L.W. 4433 (Apr. 2, 1985), that the provisions of sec. 314 of FLPMA, which provide that, upon the failure of a mining claimant to timely file annually either evidence of the performance of annual assessment work or a notice of intention to hold a mining claim, the claim is conclusively deemed abandoned and void, is constitutional and does not result in a deprivation of due process of law.

Lanny Ray Southard, 86 IBLA 239 (Apr. 30, 1985)

The Supreme Court has definitively established in United States v. Locke, 105 S. Ct. 1785 (1985), that the provisions of sec. 314 of the Federal Land Policy and Management Act of 1976, which provide that, upon the failure of a mining claimant to timely file annually either evidence of the performance of annual assessment work or a notice of intention to hold a mining claim, the claim is conclusively deemed abandoned and void, is constitutional and does not result in a deprivation of due process of law.

Charlene & Robert Schilling, 87 IBLA 52 (May 23, 1985)

CONSTITUTIONAL LAW--Continued

GENERALLY--Continued

In United States v. Locke, 105 S. Ct. 1785 (1985), the United States Supreme Court held that sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), is constitutional. Sec. 314 provides that upon the failure of a mining claimant to timely file either evidence of the performance of annual assessment work or a notice of intention to hold a mining claim, the claim is conclusively presumed to be abandoned and void. Therefore, a mining claimant is not deprived of due process where his claim is rendered abandoned and void for failure to timely make the required filing.

Myron Cherry, 87 IBLA 165 (June 12, 1985)

Warrantless inspections under the Surface Mining Control and Reclamation Act of 1977 are constitutionally permissible.

S & S Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 87 IBLA 350 (June 27, 1985)

The Supreme Court has definitively established in United States v. Locke, 105 S. Ct. 1785 (1985), that the provisions of sec. 314 of the Federal Land Policy and Management Act of 1976, which provide that, upon the failure of a mining claimant to timely file annually either evidence of the performance of annual assessment work or a notice of intention to hold a mining claim, the claim is conclusively deemed abandoned and void, are constitutional, and do not result in a deprivation of due process of law.

Ralph C. Memmott, 88 IBLA 367 (Sept. 27, 1985)

DUE PROCESS

Mining claims located on lands closed to mineral entry are null and void from their inception as a matter of law, and no property rights are created thereby. Therefore, no contest proceeding, notice, or hearing is required preliminary to a decision holding that such claims are invalid. The fact of such claims being void does not depend upon any act or decision of an administrative official.

Walter MacEwen, Malcolm MacEwen, 87 IBLA 210 (June 18, 1985)

CONTESTS AND PROTESTS

GENERALLY

Neither actual nor constructive notice of a Departmental decision is accomplished by an attempted service using certified mail where the delivering post office returns the decision to the Department after 7 days and it affirmatively appears that the addressee had not moved nor refused delivery, and the address used was his address of record.

While 43 U.S.C. § 1165 (1982) provides for issuance of a patent to an entryman upon a 2-year lapse following issuance of "receipt" when no contest is then pending, the statutory 2-year period does not begin to run at the time the entryman files his final proof, but begins only upon payment for the land. Where appellant had not paid for the land sought to be patented, but had only paid fees associated with filing his homestead entry, he was not entitled to patent.

Terry L. Wilson, 85 IBLA 206 (Feb. 28, 1985)
92 I.D. 109

CONTESTS AND PROTESTS--Continued

GENERALLY--Continued

A decision denying a protest of the contemplated issuance of noncompetitive geothermal resources leases will not be effective during the period of time in which the protestant adversely affected by the decision may file a notice of appeal, and leases issued during this time are subject to cancellation.

Sierra Club, Oregon Chapter, 87 IBLA 1 (May 17, 1985)

Where conflicting evidence exists concerning a Native allotment applicant's use and occupancy of the land claimed which raises material factual issues, the Bureau of Land Management should initiate a Government contest so that those issues can be resolved at a hearing.

Pedro Bay Corp., 88 IBLA 349 (Sept. 24, 1985)

Jurisdiction over disputes between rival mining claimants is reserved to the courts, and it is not for this Department to decide whether one claimant has a better right to a claim because of a rival claimant's alleged failure to file the documents required under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976).

Sandra Memmott, 88 IBLA 379 (Sept. 27, 1985)

CONTRACTS

CONSTRUCTION AND OPERATION

Actions of Parties

An appeal under a timber sales contract is granted where the Board finds a contractor to have been relieved of his slash burning obligations by reason of the Government having improperly deferred the burning of the slash generated under appellant's contract until such slash could be burned simultaneously with slash generated under another timber sales contract awarded at a later date to someone else.

Appeal of James L. Patten d.b.a. James Patten Logging, IBCA-1873 (Apr. 29, 1985) 92 I.D. 172

Where under a construction contract for the installation of water meters, meter boxes, and service lines, it is determined by the contemporaneous conduct of the parties during performance of work that the contract specifications did not require the contractor to replace all existing service lines in order to fully perform under the contract, the Government was found to be without justification to invoke the unit price schedule in the bid form to reduce the total contract price for quantities of existing pipe not replaced by the contractor.

Appeal of Pat Wagner d.b.a. A-Plumbing Co., IBCA-1612-8-82 (May 14, 1985) 92 I.D. 155

Cross motions for summary judgment are denied where the Board finds appellant's claim of a new valid and consummated agreement will require the resolution of disputed questions of material fact in a hearing ordered by the Board.

Appeal of Maxima Corp., IBCA-1828 (Sept. 10, 1985)
92 I.D. 378

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Allowable Costs

A contractor's claim for additional compensation for travel costs incurred during installation of a computer program package was allowed where language in the contractor's price list, incorporated by reference into the contract, specifically stated that the cost of installation was "exclusive of transportation and hotel costs," and there was no evidence that the Government rejected, amended, or withdrew such language from the contract prior to award. The Board found that the contractor made its intent manifest with respect to what was covered by its pricing proposal, and the Government accepted appellant's pricing structure by incorporating it into the contract.

Geostat Systems, Inc., IBCA-1611-8-82 (Mar. 13, 1985)

Where a contractor presented evidence of actual costs incurred for extra work and materials under the contract, such costs were presumed to be reasonable and established a prima facie case of recovery, which the Government failed to rebut.

Appeal of Pat Wagner d.b.a. A-Plumbing Co., IBCA-1612-8-82 (May 14, 1985) 92 I.D. 195

In a cost-plus-fixed-fee level of effort contract with task order options held by the Government, the contractor had the burden to prove: (1) that it gave the proper notice and received authorization from the contracting officer, under the Limitation of Costs Clause, before it could recover for any foreseeable overrun; (2) that the Government, in delaying performance of the contract, had breached a contract obligation, which breach caused increased costs, in order to recover increased overhead and general and administrative costs above the contract ceiling for delays as an equitable adjustment for an implied change arising, de facto, under the Stop Work Order Clause; (3) that the Government had an obligation to exercise options in order for the contractor to recover any amounts for failure to exercise such options. Where the contractor waited until after performance was complete to invoice for amounts in excess of contract limitations and had earlier agreed to a change accomplishing an increase of costs limitation as covering all performance, it could not and did not carry its burden for compensable overrun; where it waited over 6 years to make a claim, failed to present auditable cost records at any time, relied on the mere existence of delays to establish a Government breach and failed to connect any alleged breach to specific cost increases, it failed to carry its burden of proving delays amounting to a breach such as would allow recovery for an equitable adjustment for expenses in excess of contract ceilings as a de facto stop under the Stop Work Order clause; where it presented mere allegations of fraud and malevolence in Government motivation and conduct but failed to present proof of the allegations nor even of what they meant, it failed to carry its burden to show that the Government had some obligation to exercise contract options. The appeal was denied.

Appeal of Optimal Data Corp., IBCA-1695 (June 20, 1985) 92 I.D. 269

A claim for overrun costs is denied where an invoice is relied upon as notice to the contracting officer of impending overrun without a showing that the contracting officer had knowledge of and encouraged the added work needed to complete contract performance.

Appeal of Decision Science Consortium, Inc., IBCA-1651-2-83 (Sept. 6, 1985) 92 I.D. 372

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Changed Conditions (Differing Site Conditions)

Where under a construction contract for the installation of water meters, meter boxes, and service lines, the amount of excavation required for performance of the work is substantially greater than indicated in the contract documents, and the contractor encounters different types and lengths of service lines than indicated in the specifications, and which could not have been ascertained by a prebid investigation, the Board finds that such constitutes a first category differing site condition for which the contractor is entitled to an equitable adjustment under the Differing Site Conditions Clause.

Appeal of Pat Wagner d.b.a. A-Plumbing Co., IBCA-1612-8-82 (May 14, 1985) 92 I.D. 195

A claim for a Category 1 Differing Site Condition was denied where a contractor, engaged in core drilling operations, encountered a layer of "basal gravel" between clay and granitic bedrock, and the drill logs appended to the contract included core boring results and profiles which on their face gave readily discernible, strong, and therefore entirely reasonable indications within the meaning of the Differing Site Conditions clause that such conditions should have been anticipated at various areas of the site.

A claim for a Category 1 Differing Site Condition was denied where it was determined that the contractor failed to properly assess the information to which the Invitation For Bids directed him, and the contractor's interpretation of the materials to be encountered during drilling operations was found to be unreasonable.

Wyman Construction, Inc., IBCA-1669-4-83 (May 31, 1985) 92 I.D. 237

Where a contractor alleged that changed conditions resulted from a mutual mistake regarding geological conditions and that its costs increased due to encountering more severe caving conditions than anticipated at a test hole drill site, the Board found that the contract required remedial procedures to prevent caving when drilling in unconsolidated material and the contractor could not reasonably contend that caving conditions were not to be anticipated.

Appeal of Dy-Met, Inc., IBCA-1341 (Aug. 9, 1985)

Changes and Extras

Where under a construction contract for the installation of water meters, meter boxes, and service lines, the amount of excavation required for performance of the work is substantially greater than indicated in the contract documents, and the contractor encounters different types and lengths of service lines than indicated in the specifications, and which could not have been ascertained by a prebid investigation, the Board finds that such constitutes a first category differing site condition for which the contractor is entitled to an equitable adjustment under the Differing Site Conditions Clause.

Appeal of Pat Wagner d.b.a. A-Plumbing Co., IBCA-1612-8-82 (May 14, 1985) 92 I.D. 195

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Changes and Extras--Continued

The Board finds that a contractor is not entitled to additional compensation for the quality of finishing required on concrete work involved in the construction of raceways (rearing areas) at a fish hatchery where the concrete subcontractor contends (i) that the finishing required was superior to the finish it had anticipated would be sufficient for the project and (ii) that the finish achieved by a specified date was "nicer" than the finish on existing raceways but the Board finds that the quality of concrete finish required by the Government was not in excess of that required to meet the standards clearly set forth in the contract specifications.

Appeals of 3A/Magnolia-J.V., IBCA-1885 & 1886 (June 28, 1985) 92 I.D. 284

When the Government properly terminates a contract for its convenience, the contractor is entitled only to proper settlement costs incurred thereafter; a contractor may not recover expenses incurred in continuing performance after receiving the notice of termination where the Government did not desire such continuation and where the contractor, in ignoring the termination notice, relied on a memorandum which: (1) was written by a Government official unconnected with administration of the contract; (2) was addressed to someone other than the contractor; and (3) was dated 2 months before the termination and acquired by the contractor 1 month after the termination.

Appeal of Development & Technical Associates, Inc., IBCA-1510-8-81 (Aug. 13, 1985) 92 I.D. 355

Contract Clauses

A contractor's claim for additional compensation under a tree-planting contract was denied because the contractor's interpretation of Bid Schedule language regarding the planting method was held to be unreasonable, as such interpretation would have effectively eliminated the planting requirements contained in the contract specifications. The Government's interpretation reconciled these provisions by demonstrating that no ambiguity existed within the contract terms, and that the most reasonable interpretation of the term "Plant in Rip" was that it expressed the preference of the Government for the contractor to plant in ripped areas, not exclusively, but whenever possible within the spacing requirements of the contract.

Southern Oregon Reforestation, Inc., IBCA-1602-7-82 (February 26, 1985)

Contracting Officer

A number of appeals arising from the Government's claim of a contractor's indebtedness to the Government under a purported final decision of the contracting officer are dismissed for want of jurisdiction because the decision of the contracting officer is found to lack finality where the contractor was denied resources to respond to audit questions, the contracting officer failed to schedule audit responses as promised, the purported decision prevented discussions of the parties to reach an impass, and the decision falls short of the required standard of the impartiality and quasi-judicial attitude of a contracting officer.

Appeals of Husky Oil NPR Operations, Inc., IBCA-1871 et al. (Feb. 15, 1985) 92 I.D. 91

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Contracting Officer--Continued

A number of appeals are dismissed and remanded to the contracting officer for a decision following the completion of the auditing process where the Board found that a purportedly final decision of the contracting officer was not a final decision within the meaning of sec. 6(a) of the Contract Disputes Act. The Board noted that neither the contracting officer's decision nor the audit report on which it was based identified the contracts or grants involved in the dispute with the result that no attempt had been made by either the auditor or the contracting officer to allocate disallowed costs to individual contracts or grants. Claims arising under or related to grants were dismissed with prejudice as outside the purview of the Board's jurisdiction.

Appeals of Fort Mojave Indian Tribe of Arizona, California, & Nevada, IBCA-1968 - 1988 (June 7, 1985) 92 I.D 255

Cross motions for summary judgment are denied where the Board finds appellant's claim of a new valid and consummated agreement will require the resolution of disputed questions of material fact in a hearing ordered by the Board.

Appeal of Maxima Corp., IBCA-1828 (Sept. 10, 1985) 92 I.D. 378

Contractor

A claim for additional compensation based upon a claim of defective specifications is denied where the subcontractor prosecuting the appeal fails to show (i) that the Government made any attempt to enforce a particular specification provision at the station where the disputed work was performed or (ii) that the difficulties encountered in drilling holes for and installing instrumentation in the foundation of an earth-filled dam were attributable to defective specifications rather than to the failure of the prime contractor to properly coordinate the contract work.

Appeal of Industrial Constructors, Inc., IBCA-1831 (Mar. 26, 1985) 92 I.D. 146

Differing Site Conditions (Changed Conditions)

Formal written notice given after completion of the contract work is found to satisfy the requirement of the Differing Site Conditions clause for written notice to the contracting officer, where the evidence shows that the Government had actual knowledge of the operative facts relating to the contractor's claim and no showing was made that any prejudice to the Government had resulted from the belated written notice.

Where under a construction contract for the installation of water meters, meter boxes, and service lines, the amount of excavation required for performance of the work is substantially greater than indicated in the contract documents, and the contractor encounters different types and lengths of service lines than indicated in the specifications, and which could not have been ascertained by a prebid investigation, the Board finds that such constitutes a first category differing site condition for which the contractor is entitled to an equitable adjustment under the Differing Site Conditions Clause.

Appeal of Pat Wagner d.b.a. A-Plumbing Co., IBCA-1612-8-82 (May 14, 1985) 92 I.D. 195

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Differing Site Conditions (Changed Conditions) --Continued

A claim for a Category 1 Differing Site Condition was denied where a contractor, engaged in core drilling operations, encountered a layer of "basal gravel" between clay and granitic bedrock, and the drill logs appended to the contract included core boring results and profiles which on their face gave readily discernible, strong, and therefore entirely reasonable indications within the meaning of the Differing Site Conditions clause that such conditions should have been anticipated at various areas of the site.

A claim for a Category 1 Differing Site Condition was denied where it was determined that the contractor failed to properly assess the information to which the Invitation For Bids directed him, and the contractor's interpretation of the materials to be encountered during drilling operations was found to be unreasonable.

Wyman Construction, Inc., IBCA-1669-4-83 (May 31, 1985) 92 I.D. 237

Where a contractor alleged that changed conditions resulted from a mutual mistake regarding geological conditions and that its costs increased due to encountering more severe caving conditions than anticipated at a test hole drill site, the Board found that the contract required remedial procedures to prevent caving when drilling in unconsolidated material and the contractor could not reasonably contend that caving conditions were not to be anticipated.

Appeal of Dy-Met, Inc., IBCA-1341 (Aug. 9, 1985)

Drawings and Specifications

A claim for additional compensation based upon a claim of defective specifications is denied where the subcontractor prosecuting the appeal fails to show (i) that the Government made any attempt to enforce a particular specification provision at the station where the disputed work was performed or (ii) that the difficulties encountered in drilling holes for and installing instrumentation in the foundation of an earth-filled dam were attributable to defective specifications rather than to the failure of the prime contractor to properly coordinate the contract work.

Appeal of Industrial Constructors, Inc., IBCA-1831 (Mar. 26, 1985) 92 I.D. 146

A claim for a Category 1 Differing Site Condition was denied where a contractor, engaged in core drilling operations, encountered a layer of "basal gravel" between clay and granitic bedrock, and the drill logs appended to the contract included core boring results and profiles which on their face gave readily discernible, strong, and therefore entirely reasonable indications within the meaning of the Differing Site Conditions clause that such conditions should have been anticipated at various areas of the site.

A claim for a Category 1 Differing Site Condition was denied where it was determined that the contractor failed to properly assess the information to which the Invitation For Bids directed him, and the contractor's interpretation of the materials to be encountered during drilling operations was found to be unreasonable.

Wyman Construction, Inc., IBCA-1669-4-83 (May 31, 1985) 92 I.D. 237

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Drawings and Specifications--Continued

A dispute under a construction contract as to whether a waterstop is required for interior walls at expansion joints is resolved in the Government's favor where its interpretation effects a reconciliation between the requirements in the contract drawings for fixed, nonmovable construction joints and those for movable expansion/contraction joints.

The Board finds that a contractor is not entitled to additional compensation for the quality of finishing required on concrete work involved in the construction of raceways (rearing areas) at a fish hatchery where the concrete subcontractor contends (i) that the finishing required was superior to the finish it had anticipated would be sufficient for the project and (ii) that the finish achieved by a specified date was "nicer" than the finish on existing raceways but the Board finds that the quality of concrete finish required by the Government was not in excess of that required to meet the standards clearly set forth in the contract specifications.

Appeals of 3A/Magnolia-J.V., IBCA-1885 & 1886 (June 28, 1985) 92 I.D. 284

Where a contracting officer asserted that the contract was negotiated in contemplation of drilling a total of 28,150 feet of test holes and reduced the lump sum price for the contract when the total amount of drilling fell short of 28,150 feet, the Board found that the drilling specifications did not require a specific total of drilling and since the amount of drilling accomplished had Government approval, the contractor was entitled to the full lump sum contract price.

Appeal of Dy-Met, Inc., IBCA-1341 (Aug. 9, 1985)

Costs incurred for additional amounts of grouting and concrete required to seal fractured rock encountered during installation of ground anchors during an emergency residential subsidence project, were not compensable because the specifications contained in the contract were not defective and the contractor was responsible for choosing suitable construction methods. The contractor claimed entitlement to an equitable adjustment for such additional work and costs on the grounds that: (1) it was not provided relative boring data prior to award in order to determine subsurface conditions; (2) that the specifications were defective in that there was insufficient time involved in the bidding process to conduct an adequate subsurface site investigation; (3) that it encountered unexpected rock fractures which resulted in overruns of concrete and grout; and (4) that such conditions necessitated extra work to conform to the requirements of the contract. However, the contractor failed to sustain its burden of proof that the Government withheld relevant boring information, and the evidence demonstrated that the excess costs incurred were not the result of any defect in the specifications but pertained to those aspects of the work for which the contractor bore responsibility.

Nicholson Construction Co., IBCA-1711-8-83 (Aug. 15, 1985)

In a dispute over claimed compensation for additional work in a contract for burning of brush and other vegetation in a remote site, where the contract clause allowing compensation contained an exception for such work caused by the contractor's fault or negligence, the Board (1) held that the specifications and drawings on method of performance were not ambiguous, and that even if they were, the contractor

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Drawings and Specifications--Continued

had failed in his duty to inquire so as to clear up any ambiguity; (2) found that the contractor's method of performance did not comply with the contract's prescribed method; (3) found that the contractor's non-complying method had caused the conditions that led to the need for the additional work; and (4) denied the appeal on the ground that the additional work was caused by the contractor's fault or negligence.

Appeal of Sam McKee, IBCA-1790 (Sept. 27, 1985)

Duty to Inquire

In a dispute over claimed compensation for additional work in a contract for burning of brush and other vegetation in a remote site, where the contract clause allowing compensation contained an exception for such work caused by the contractor's fault or negligence, the Board (1) held that the specifications and drawings on method of performance were not ambiguous, and that even if they were, the contractor had failed in his duty to inquire so as to clear up any ambiguity; (2) found that the contractor's method of performance did not comply with the contract's prescribed method; (3) found that the contractor's non-complying method had caused the conditions that led to the need for the additional work; and (4) denied the appeal on the ground that the additional work was caused by the contractor's fault or negligence.

Appeal of Sam McKee, IBCA-1790 (Sept. 27, 1985)

Estimated Quantities

Where under a construction contract for the installation of water meters, meter boxes, and service lines, the amount of excavation required for performance of the work is substantially greater than indicated in the contract documents, and the contractor encounters different types and lengths of service lines than indicated in the specifications, and which could not have been ascertained by a prebid investigation, the Board finds that such constitutes a first category differing site condition for which the contractor is entitled to an equitable adjustment under the Differing Site Conditions Clause.

Appeal of Pat Wagner d.b.a. A-Plumbing Co., IBCA-1612-8-82 (May 14, 1985) 92 I.D. 195

General Rules of Construction

A contractor's claim for additional compensation under a tree-planting contract was denied because the contractor's interpretation of Bid Schedule language regarding the planting method was held to be unreasonable, as such interpretation would have effectively eliminated the planting requirements contained in the contract specifications. The Government's interpretation reconciled these provisions by demonstrating that no ambiguity existed within the contract terms, and that the most reasonable interpretation of the term "plant in Rip" was that it expressed the preference of the Government for the contractor to plant in ripped areas, not exclusively, but whenever possible within the spacing requirements of the contract.

Southern Oregon Reforestation, Inc., IBCA-1602-7-82 (February 26, 1985)

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

General Rules of Construction--Continued

A contractor's claim for additional compensation for travel costs incurred during installation of a computer program package was allowed where language in the contractor's price list, incorporated by reference into the contract, specifically stated that the cost of installation was "exclusive of transportation and hotel costs," and there was no evidence that the Government rejected, amended, or withdrew such language from the contract prior to award. The Board found that the contractor made its intent manifest with respect to what was covered by its pricing proposal, and the Government accepted appellant's pricing structure by incorporating it into the contract.

Geostat Systems, Inc., IBCA-1611-6-82 (Mar. 13, 1985)

A claim for a Category 1 Differing Site Condition was denied where a contractor, engaged in core drilling operations, encountered a layer of "basal gravel" between clay and granitic bedrock, and the drill logs appended to the contract included core boring results and profiles which on their face gave readily discernible, strong, and therefore entirely reasonable indications within the meaning of the Differing Site Conditions clause that such conditions should have been anticipated at various areas of the site.

A claim for a Category 1 Differing Site Condition was denied where it was determined that the contractor failed to properly assess the information to which the Invitation For Bids directed him, and the contractor's interpretation of the materials to be encountered during drilling operations was found to be unreasonable.

Wyman Construction, Inc., IBCA-1669-4-83 (May 31, 1985) 92 I.D. 237

A dispute under a construction contract as to whether a waterstop is required for interior walls at expansion joints is resolved in the Government's favor where its interpretation effects a reconciliation between the requirements in the contract drawings for fixed, nonmovable construction joints and those for movable expansion/contraction joints.

Appeals of 3B/Magnolia-J.V., IBCA-1885 & 1886 (June 28, 1985) 92 I.D. 284

Costs incurred for additional amounts of grouting and concrete required to seal fractured rock encountered during installation of ground anchors during an emergency residential subsidence project, were not compensable because the specifications contained in the contract were not defective and the contractor was responsible for choosing suitable construction methods. The contractor claimed entitlement to an equitable adjustment for such additional work and costs on the grounds that: (1) it was not provided relative boring data prior to award in order to determine subsurface conditions; (2) that the specifications were defective in that there was insufficient time involved in the bidding process to conduct an adequate subsurface site investigation; (3) that it encountered unexpected rock fractures which resulted in overruns of concrete and grout; and (4) that such conditions necessitated extra work to conform to the requirements of the contract. However, the contractor failed to sustain its burden of proof that the Government withheld relevant boring information, and the evidence demonstrated that the excess costs incurred were not the result of any defect in the specifications

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

General Rules of Construction--Continued

but pertained to those aspects of the work for which the contractor bore responsibility.

Nicholson Construction Co., IBCA-1711-8-83 (Aug. 15, 1985)

A motion for reconsideration is denied where the authority relied upon by appellant in support of its motion is found to be distinguishable from the facts of the instant case, and no other arguments or insights are presented which were not previously considered by the Board and rejected.

Appeal of Wyman Construction, Inc., IBCA-1669-4-83 (Aug. 21, 1985)

Intent of Parties

Where a contracting officer asserted that the contract was negotiated in contemplation of drilling a total of 28,150 feet of test holes and reduced the lump sum price for the contract when the total amount of drilling fell short of 28,150 feet, the Board found that the drilling specifications did not require a specific total of drilling and since the amount of drilling accomplished had Government approval, the contractor was entitled to the full lump sum contract price.

Appeal of Dy-Met, Inc., IBCA-1341 (Aug. 9, 1985)

Cross motions for summary judgment are denied where the Board finds appellant's claim of a new valid and consummated agreement will require the resolution of disputed questions of material fact in a hearing ordered by the Board.

Appeal of Maxima Corp., IBCA-1828 (Sept. 10, 1985) 92 I.D. 378

Modification of Contracts

Generally

Cross motions for summary judgment are denied where the Board finds appellant's claim of a new valid and consummated agreement will require the resolution of disputed questions of material fact in a hearing ordered by the Board.

Appeal of Maxima Corp., IBCA-1828 (Sept. 10, 1985) 92 I.D. 378

Duress

A Government motion for summary judgment is denied where the Board finds that the defense of duress interposed by the appellant to the default termination of its contract will require the resolution of disputed questions of material fact and that the appellant is therefore entitled to the oral hearing it has requested.

Appeal of Pearson Machine Controls, Inc., IBCA-1959 (July 31, 1985) 92 I.D. 350

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Notices

Formal written notice given after completion of the contract work is found to satisfy the requirement of the Differing Site Conditions clause for written notice to the contracting officer, where the evidence shows that the Government had actual knowledge of the operative facts relating to the contractor's claim and no showing was made that any prejudice to the Government had resulted from the belated written notice.

Appeal of Pat Wagner d.b.a. A-Plumbing Co., IBCA-1612-8-82 (May 14, 1985) 92 I.D. 195

In a cost-plus-fixed-fee level of effort contract with task order options held by the Government, the contractor had the burden to prove: (1) that it gave the proper notice and received authorization from the contracting officer, under the Limitation of Costs Clause, before it could recover for any foreseeable overrun; (2) that the Government, in delaying performance of the contract, had breached a contract obligation, which breach caused increased costs, in order to recover increased overhead and general and administrative costs above the contract ceiling for delays as an equitable adjustment for an implied change arising, de facto, under the Stop Work Order Clause; (3) that the Government had an obligation to exercise options in order for the contractor to recover any amounts for failure to exercise such options. Where the contractor waited until after performance was complete to invoice for amounts in excess of contract limitations and had earlier agreed to a change accomplishing an increase of costs limitation as covering all performance, it could not and did not carry its burden for compensable overrun; where it waited over 6 years to make a claim, failed to present auditable cost records at any time, relied on the mere existence of delays to establish a Government breach and failed to connect any alleged breach to specific cost increases, it failed to carry its burden of proving delays amounting to a breach such as would allow recovery for an equitable adjustment for expenses in excess of contract ceilings as a de facto stop under the Stop Work Order clause; where it presented mere allegations of fraud and malevolence in Government motivation and conduct but failed to present proof of the allegations nor even of what they meant, it failed to carry its burden to show that the Government had some obligation to exercise contract options. The appeal was denied.

Appeal of Optimal Data Corp., IBCA-1695 (June 20, 1985) 92 I.D. 269

A termination for default is sustained where the Board finds (i) that neither a written nor an oral request for a time extension was made during the performance of the contract; (ii) that the appellant failed to establish any of the assigned causes of delay as excusable; and (iii) that the contractor repudiated his obligation to proceed with the performance of the contract prior to its completion.

Appeal of Timberland Management, IBCA-1877 (July 31, 1985) 92 I.D. 340

Payments

Where under a construction contract for the installation of water meters, meter boxes, and service lines, it is determined by the contemporaneous conduct of the parties during performance of work that the contract specifications did not require the contractor to replace all existing service lines in order to fully perform under the contract, the Government was found to be without justification to invoke the unit price

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Payments--Continued

schedule in the bid form to reduce the total contract price for quantities of existing pipe not replaced by the contractor.

Appeal of Pat Wagner d.b.a. A-Plumbing Co., IBCA-1612-8-82 (May 14, 1985) 92 I.D. 195

A payment in excess of the contract value after a decision by the contracting officer not to fund an overrun is found to be an erroneous payment which may be recovered by the Government.

Appeal of Decision Science Consortium, Inc., IBCA-1651-2-83 (Sept. 6, 1985) 92 I.D. 372

Cross motions for summary judgment are denied where the Board finds appellant's claim of a new valid and consummated agreement will require the resolution of disputed questions of material fact in a hearing ordered by the Board.

Appeal of Maxima Corp., IBCA-1828 (Sept. 10, 1985) 92 I.D. 378

Subcontractors and Suppliers

A claim for additional compensation based upon a claim of defective specifications is denied where the subcontractor prosecuting the appeal fails to show (i) that the Government made any attempt to enforce a particular specification provision at the station where the disputed work was performed or (ii) that the difficulties encountered in drilling holes for and installing instrumentation in the foundation of an earth-filled dam were attributable to defective specifications rather than to the failure of the prime contractor to properly coordinate the contract work.

Appeal of Industrial Constructors, Inc., IBCA-1831 (Mar. 26, 1985) 92 I.D. 146

CONTRACT DISPUTES ACT OF 1978

Jurisdiction

An appeal under the Contract Disputes Act filed more than 90 days after a contractor's receipt of a contracting officer's final decision is dismissed as untimely.

Appeal of William Cargile Contractor, Inc., IBCA-1787-3-84 (Jan. 8, 1985) 92 I.D. 53

A number of appeals arising from the Government's claim of a contractor's indebtedness to the Government under a purported final decision of the contracting officer are dismissed for want of jurisdiction because the decision of the contracting officer is found to lack finality where the contractor was denied resources to respond to audit questions, the contracting officer failed to schedule audit responses as promised, the purported decision prevented discussions of the parties to reach an impass, and the decision falls short of the required standard of the impartiality and quasi-judicial attitude of a contracting officer.

Appeals of Husky Oil NPR Operations, Inc., IBCA-1871 et al. (Feb. 15, 1985) 92 I.D. 91

CONTRACTS--Continued

CONTRACT DISPUTES ACT OF 1978--Continued

Jurisdiction--Continued

A number of appeals are dismissed and remanded to the contracting officer for a decision following the completion of the auditing process where the Board found that a purportedly final decision of the contracting officer was not a final decision within the meaning of sec. 6(a) of the Contract Disputes Act. The Board noted that neither the contracting officer's decision nor the audit report on which it was based identified the contracts or grants involved in the dispute with the result that no attempt had been made by either the auditor or the contracting officer to allocate disallowed costs to individual contracts or grants. Claims arising under or related to grants were dismissed with prejudice as outside the purview of the Board's jurisdiction.

Appeals of Fort Mojave Indian Tribe of Arizona, California, & Nevada, IBCA-1968 - 1988 (June 7, 1985) 92 I.D. 255

Where a purported certification included only one of the three assertions required by 41 U.S.C. § 605(c)(1), the Board held the attempted certification to be improper and that it had no jurisdiction to consider the claims involved.

Appeals of Whitesell-Green, Inc., IBCA-1927 - 1940 (June 13, 1985) 92 I.D. 263

DISPUTES AND REMEDIES

Appeals

A number of appeals arising from the Government's claim of a contractor's indebtedness to the Government under a purported final decision of the contracting officer are dismissed for want of jurisdiction because the decision of the contracting officer is found to lack finality where the contractor was denied resources to respond to audit questions, the contracting officer failed to schedule audit responses as promised, the purported decision prevented discussions of the parties to reach an impass, and the decision falls short of the required standard of the impartiality and quasi-judicial attitude of a contracting officer.

Appeals of Husky Oil NPR Operations, Inc., IBCA-1871 et al. (Feb. 15, 1985) 92 I.D. 91

A number of appeals are dismissed and remanded to the contracting officer for a decision following the completion of the auditing process where the Board found that a purportedly final decision of the contracting officer was not a final decision within the meaning of sec. 6(a) of the Contract Disputes Act. The Board noted that neither the contracting officer's decision nor the audit report on which it was based identified the contracts or grants involved in the dispute with the result that no attempt had been made by either the auditor or the contracting officer to allocate disallowed costs to individual contracts or grants. Claims arising under or related to grants were dismissed with prejudice as outside the purview of the Board's jurisdiction.

Appeals of Fort Mojave Indian Tribe of Arizona, California, & Nevada, IBCA-1968 - 1988 (June 7, 1985) 92 I.D. 255

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Burden of Proof

A contractor's claim for travel costs associated with an aborted trip to install computer software, was denied where the contractor failed to demonstrate that the alleged installation date had been confirmed by the Government, or that it otherwise established entitlement to such costs as alleged.

Geostat Systems, Inc., IBCA-1611-8-82 (Mar. 13, 1985)

An appeal under a timber sales contract is granted where the Board finds a contractor to have been relieved of his slash burning obligations by reason of the Government having improperly deferred the burning of the slash generated under appellant's contract until such slash could be burned simultaneously with slash generated under another timber sales contract awarded at a later date to someone else.

Appeal of James L. Patten d.b.a. James Patten Logging, IBCA-1873 (Apr. 29, 1985) 92 I.D. 172

In a cost-plus-fixed-fee level of effort contract with task order options held by the Government, the contractor had the burden to prove: (1) that it gave the proper notice and received authorization from the contracting officer, under the Limitation of Costs Clause, before it could recover for any foreseeable overrun; (2) that the Government, in delaying performance of the contract, had breached a contract obligation, which breach caused increased costs, in order to recover increased overhead and general and administrative costs above the contract ceiling for delays as an equitable adjustment for an implied change arising, de facto, under the Stop Work Order Clause; (3) that the Government had an obligation to exercise options in order for the contractor to recover any amounts for failure to exercise such options. Where the contractor waited until after performance was complete to invoice for amounts in excess of contract limitations and had earlier agreed to a change accomplishing an increase of costs limitation as covering all performance, it could not and did not carry its burden for compensable overrun; where it waited over 6 years to make a claim, failed to present auditable cost records at any time, relied on the mere existence of delays to establish a Government breach and failed to connect any alleged breach to specific cost increases, it failed to carry its burden of proving delays amounting to a breach such as would allow recovery for an equitable adjustment for expenses in excess of contract ceilings as a de facto stop under the Stop Work Order clause; where it presented mere allegations of fraud and malevolence in Government motivation and conduct but failed to present proof of the allegations nor even of what they meant, it failed to carry its burden to show that the Government had some obligation to exercise contract options. The appeal was denied.

Appeal of Optimal Data Corp., IBCA-1695 (June 20, 1985) 92 I.D. 269

Equitable Adjustments

A contractor's claim for travel costs associated with an aborted trip to install computer software, was denied where the contractor failed to demonstrate that the alleged installation date had been confirmed by the Government, or that it otherwise established entitlement to such costs as alleged.

Geostat Systems, Inc., IBCA-1611-8-82 (Mar. 13, 1985)

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Equitable Adjustments--Continued

Where a contractor presented evidence of actual costs incurred for extra work and materials under the contract, such costs were presumed to be reasonable and established a prima facie case of recovery, which the Government failed to rebut.

Appeal of Pat Wagner d.b.a. A-Plumbing Co., IBCA-1612-8-82 (May 14, 1985) 92 I.D. 195

A revised claim for slab dowel cuttings is approved in the amount requested where the Board finds the estimated costs submitted by the subcontractor who performed the work to be more persuasive than the estimate submitted by the Government. Noted by the Board was the fact that none of the Government's estimates were based on observing the performance of the work and that an estimating guide employed by the Government only purported to cover one of the two elements necessarily involved in completing the work.

Appeals of 3A/Magnolia-J.V., IBCA-1885 & 1886 (June 28, 1985) 92 I.D. 284

Costs incurred for additional amounts of grouting and concrete required to seal fractured rock encountered during installation of ground anchors during an emergency residential subsidence project, were not compensable because the specifications contained in the contract were not defective and the contractor was responsible for choosing suitable construction methods. The contractor claimed entitlement to an equitable adjustment for such additional work and costs on the grounds that: (1) it was not provided relative boring data prior to award in order to determine subsurface conditions; (2) that the specifications were defective in that there was insufficient time involved in the bidding process to conduct an adequate subsurface site investigation; (3) that it encountered unexpected rock fractures which resulted in overruns of concrete and grout; and (4) that such conditions necessitated extra work to conform to the requirements of the contract. However, the contractor failed to sustain its burden of proof that the Government withheld relevant boring information, and the evidence demonstrated that the excess costs incurred were not the result of any defect in the specifications but pertained to those aspects of the work for which the contractor bore responsibility.

Nicholson Construction Co., IBCA-1711-8-83 (Aug. 15, 1985)

Jurisdiction

A number of appeals arising from the Government's claim of a contractor's indebtedness to the Government under a purported final decision of the contracting officer are dismissed for want of jurisdiction because the decision of the contracting officer is found to lack finality where the contractor was denied resources to respond to audit questions, the contracting officer failed to schedule audit responses as promised, the purported decision prevented discussions of the parties to reach an impass, and the decision falls short of the required standard of the impartiality and quasi-judicial attitude of a contracting officer.

Appeals of Husky Oil NPR Operations, Inc., IBCA-1871 et al. (Feb. 15, 1985) 92 I.D. 91

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Termination for Convenience

When the Government properly terminates a contract for its convenience, the contractor is entitled only to proper settlement costs incurred thereafter; a contractor may not recover expenses incurred in continuing performance after receiving the notice of termination where the Government did not desire such continuation and where the contractor, in ignoring the termination notice, relied on a memorandum which: (1) was written by a Government official unconnected with administration of the contract; (2) was addressed to someone other than the contractor; and (3) was dated 2 months before the termination and acquired by the contractor 1 month after the termination.

Appeal of Development & Technical Associates, Inc., IBCA-1510-8-81 (Aug. 13, 1985) 92 I.D. 355

Termination for Default

Generally

A termination for default is sustained where the Board finds (i) that neither a written nor an oral request for a time extension was made during the performance of the contract; (ii) that the appellant failed to establish any of the assigned causes of delay as excusable; and (iii) that the contractor repudiated his obligation to proceed with the performance of the contract prior to its completion.

Appeal of Timberland Management, IBCA-1877 (July 31, 1985) 92 I.D. 340

A Government motion for summary judgment is denied where the Board finds that the defense of duress interposed by the appellant to the default termination of its contract will require the resolution of disputed questions of material fact and that the appellant is therefore entitled to the oral hearing it has requested.

Appeal of Pearson Machine Controls, Inc., IBCA-1959 (July 31, 1985) 92 I.D. 350

FORMATION AND VALIDITY

Generally

In a cost-plus-fixed-fee level of effort contract with task order options held by the Government, the contractor had the burden to prove: (1) that it gave the proper notice and received authorization from the contracting officer, under the Limitation of Costs Clause, before it could recover for any foreseeable overrun; (2) that the Government, in delaying performance of the contract, had breached a contract obligation, which breach caused increased costs, in order to recover increased overhead and general and administrative costs above the contract ceiling for delays as an equitable adjustment for an implied change arising, de facto, under the Stop Work Order Clause; (3) that the Government had an obligation to exercise options in order for the contractor to recover any amounts for failure to exercise such options. Where the contractor waited until after performance was complete to invoice for amounts in excess of contract limitations and had earlier agreed to a change accomplishing an increase of costs limitation as covering all performance, it could not and did not carry its burden for compensable overrun; where it waited over 6 years to make a claim, failed to present auditable cost records at any time, relied on the mere existence of delays to establish a Government breach and failed to connect any alleged breach to specific cost increases, it failed to carry its burden of proving delays amounting to a breach such as would

CONTRACTS--Continued

FORMATION AND VALIDITY--Continued

Generally--Continued

allow recovery for an equitable adjustment for expenses in excess of contract ceilings as a de facto stop under the Stop Work Order clause; where it presented mere allegations of fraud and malevolence in Government motivation and conduct but failed to present proof of the allegations nor even of what they meant, it failed to carry its burden to show that the Government had some obligation to exercise contract options. The appeal was denied.

Appeal of Optimal Data Corp., IBCA-1695 (June 20, 1985) 92 I.D. 269

Mistakes

Where a contractor alleged that changed conditions resulted from a mutual mistake regarding geological conditions and that its costs increased due to encountering more severe caving conditions than anticipated at a test hole drill site, the Board found that the contract required remedial procedures to prevent caving when drilling in unconsolidated material and the contractor could not reasonably contend that caving conditions were not to be anticipated.

Appeal of Dy-Met, Inc., IBCA-1341 (Aug. 9, 1985)

PERFORMANCE OR DEFAULT

Acceleration

What constitutes an order to accelerate in a case where the contractor's theory of recoverability is constructive acceleration should not be measured against a rigid standard, being a flexible notion to be determined on a case-by-case basis; what must be found before a conclusion of constructive acceleration is proper are circumstances which suggest a reasonable conclusion that the Government wanted the contract work accelerated and pressured the contractor to accelerate in fact. In a case where the contract required the contractor to perform at sea and provided that unusually poor weather constituted an excuse for delay, the Government's (1) insistence that the contractor remain at sea ready to perform whenever the weather provided even short periods of operable time, (2) unreasonable delay in responding to the contractor's request for extension because of bad weather, and (3) issuance of cure notices threatening default termination for allegedly untimely performance when the contract's terms required an extension of the performance period for excusable weather-related delays, taken together, constitute the circumstances necessary to a conclusion of constructive acceleration.

Appeal of Intersea Research Corp., IBCA-1675 (Apr. 25, 1985) 92 I.D. 157

Acceptance of Performance

An appeal from a termination for default and an assessment of excess costs is denied where the Board finds (i) that a preliminary inspection of hay incident to a preaward survey did not preclude the Government from rejecting a substantial portion of the same hay when delivered to the destination specified in the solicitation; (ii) that the contract was properly terminated for default when the contractor failed to deliver the required quantity of acceptable hay within the time specified; and (iii) that the amount of excess

CONTRACTS--Continued

PERFORMANCE OR DEFAULT--Continued

Acceptance of Performance--Continued

costs involved in reprocuring the hay from another source was reasonable.

Appeal of Malheur Lake Farms, Inc., IBCA-1808 (Jan. 28, 1985) 92 I.D. 63

Compensable Delays

In a cost-plus-fixed-fee level of effort contract with task order options held by the Government, the contractor had the burden to prove: (1) that it gave the proper notice and received authorization from the contracting officer, under the Limitation of Costs Clause, before it could recover for any foreseeable overrun; (2) that the Government, in delaying performance of the contract, had breached a contract obligation, which breach caused increased costs, in order to recover increased overhead and general and administrative costs above the contract ceiling for delays as an equitable adjustment for an implied change arising, de facto, under the Stop Work Order Clause; (3) that the Government had an obligation to exercise options in order for the contractor to recover any amounts for failure to exercise such options. Where the contractor waited until after performance was complete to invoice for amounts in excess of contract limitations and had earlier agreed to a change accomplishing an increase of costs limitation as covering all performance, it could not and did not carry its burden for compensable overrun; where it waited over 6 years to make a claim, failed to present auditable cost records at any time, relied on the mere existence of delays to establish a Government breach and failed to connect any alleged breach to specific cost increases, it failed to carry its burden of proving delays amounting to a breach such as would allow recovery for an equitable adjustment for expenses in excess of contract ceilings as a de facto stop under the Stop Work Order clause; where it presented mere allegations of fraud and malevolence in Government motivation and conduct but failed to present proof of the allegations nor even of what they meant, it failed to carry its burden to show that the Government had some obligation to exercise contract options. The appeal was denied.

Appeal of Optimal Data Corp., IBCA-1695 (June 20, 1985) 92 I.D. 269

Excusable Delays

What constitutes an order to accelerate in a case where the contractor's theory of recoverability is constructive acceleration should not be measured against a rigid standard, being a flexible notion to be determined on a case-by-case basis; what must be found before a conclusion of constructive acceleration is proper are circumstances which suggest a reasonable conclusion that the Government wanted the contract work accelerated and pressured the contractor to accelerate in fact. In a case where the contract required the contractor to perform at sea and provided that unusually poor weather constituted an excuse for delay, the Government's (1) insistence that the contractor remain at sea ready to perform whenever the weather provided even short periods of operable time, (2) unreasonable delay in responding to the contractor's request for extension because of bad weather, and (3) issuance of cure notices threatening default termination for allegedly untimely performance when the contract's terms required an extension of the performance period for excusable weather-related delays,

CONTRACTS--Continued

PERFORMANCE OR DEFAULT--Continued

Excusable Delays--Continued

taken together, constitute the circumstances necessary to a conclusion of constructive acceleration.

Appeal of Intersea Research Corp., IBCA-1675 (Apr. 25, 1985) 92 I.D. 157

A termination for default is sustained where the Board finds (i) that neither a written nor an oral request for a time extension was made during the performance of the contract; (ii) that the appellant failed to establish any of the assigned causes of delay as excusable; and (iii) that the contractor repudiated his obligation to proceed with the performance of the contract prior to its completion.

Appeal of Timberland Management, IBCA-1877 (July 31, 1985) 92 I.D. 340

Impossibility of Performance

A claim for additional compensation based upon a claim of defective specifications is denied where the subcontractor prosecuting the appeal fails to show (i) that the Government made any attempt to enforce a particular specification provision at the station where the disputed work was performed or (ii) that the difficulties encountered in drilling holes for and installing instrumentation in the foundation of an earth-filled dam were attributable to defective specifications rather than to the failure of the prime contractor to properly coordinate the contract work.

Appeal of Industrial Constructors, Inc., IBCA-1831 (Mar. 26, 1985) 92 I.D. 146

Inspection

An appeal from a termination for default and an assessment of excess costs is denied where the Board finds (i) that a preliminary inspection of hay incident to a preaward survey did not preclude the Government from rejecting a substantial portion of the same hay when delivered to the destination specified in the solicitation; (ii) that the contract was properly terminated for default when the contractor failed to deliver the required quantity of acceptable hay within the time specified; and (iii) that the amount of excess costs involved in reprocuring the hay from another source was reasonable.

Appeal of Malheur Lake Farms, Inc., IBCA-1808 (Jan. 28, 1985) 92 I.D. 63

Substantial Performance

A Government motion for summary judgment is denied where the Board finds that the defense of duress interposed by the appellant to the default termination of its contract will require the resolution of disputed questions of material fact and that the appellant is therefore entitled to the oral hearing it has requested.

Appeal of Pearson Machine Controls, Inc., IBCA-1959 (July 31, 1985) 92 I.D. 350

CONTRACTS--Continued

PERFORMANCE OR DEFAULT--Continued

Suspension of Work

In a cost-plus-fixed-fee level of effort contract with task order options held by the Government, the contractor had the burden to prove: (1) that it gave the proper notice and received authorization from the contracting officer, under the Limitation of Costs Clause, before it could recover for any foreseeable overrun; (2) that the Government, in delaying performance of the contract, had breached a contract obligation, which breach caused increased costs, in order to recover increased overhead and general and administrative costs above the contract ceiling for delays as an equitable adjustment for an implied change arising, de facto, under the Stop Work Order Clause; (3) that the Government had an obligation to exercise options in order for the contractor to recover any amounts for failure to exercise such options. Where the contractor waited until after performance was complete to invoice for amounts in excess of contract limitations and had earlier agreed to a change accomplishing an increase of costs limitation as covering all performance, it could not and did not carry its burden for compensable overrun; where it waited over 6 years to make a claim, failed to present auditable cost records at any time, relied on the mere existence of delays to establish a Government breach and failed to connect any alleged breach to specific cost increases, it failed to carry its burden of proving delays amounting to a breach such as would allow recovery for an equitable adjustment for expenses in excess of contract ceilings as a de facto stop under the Stop Work Order clause; where it presented mere allegations of fraud and malevolence in Government motivation and conduct but failed to present proof of the allegations nor even of what they meant, it failed to carry its burden to show that the Government had some obligation to exercise contract options. The appeal was denied.

Appeal of Optimal Data Corp., IBCA-1695 (June 20, 1985) 92 I.D. 269

CONVEYANCES

GENERALLY

A quitclaim deed conveys only the interest held by the grantor. Conveyance by quitclaim deed of an interest in a mining claim which is properly held to have been void ab initio conveys no interest to the grantee.

George R. Schultz et al., 85 IBLA 77 (Feb. 14, 1985) 92 I.D. 83

The legislative history of the Act of July 6, 1960, clearly shows that Congress concluded that the Federal Government holds title to land relinquished to the Federal Government in anticipation of a forest lieu exchange, notwithstanding the failure to consummate the exchange.

An application for a recordable disclaimer of the Government's interest in a parcel of land in the Los Padres National Forest (formerly, Pine Mountain and Zaca Lake Forest Reserve) pursuant to sec. 315 of the Federal Land Policy and Management Act of 1976, which parcel was deeded to the Government in 1901 in contemplation of selecting another parcel in lieu thereof pursuant to the Act of June 4, 1897, is properly rejected even though the lieu selection was never consummated, because the Act of July 6, 1960, quieted title to such land in the United States as part of the national forest in which the lands are located.

Frederick Siemon, 86 IBLA 149 (Apr. 25, 1985)

CONVEYANCES--Continued

INTEREST CONVEYED

A quitclaim deed conveys only the interest held by the grantor. Conveyance by quitclaim deed of an interest in a mining claim which is properly held to have been void ab initio conveys no interest to the grantee.

George R. Schultz et al., 85 IBLA 77 (Feb. 14, 1985) 92 I.D. 83

DELEGATION OF AUTHORITY

The Secretary of the Interior may properly delegate the authority to suspend oil and gas leases, and, the party to whom this authority is delegated may act on behalf of the Secretary in approving applications for suspension.

American Resource Management Corp. (On Judicial Remand), 88 IBLA 172 (Aug. 20, 1985)

DESERT LAND ENTRY

GENERALLY

Where on appeal from a decision rejecting a desert land entry application because the applicant has failed to show that appropriate steps have been taken to acquire a water right, the applicant subsequently clarifies his intent such that a sufficient water right might be available, the decision rejecting the application will be set aside and the case file will be remanded to permit reconsideration of the application.

Silvia S. Rousseau, 85 IBLA 46 (Feb. 5, 1985)

In the absence of statutory authority, no "second entry" can be made under the Desert Land Act, 19 Stat. 377, 43 U.S.C. § 321 (1982). Under the regulation, 43 CFR 2521.1(b), right of desert land entry is exhausted by the making of an entry.

Paul W. Smith, 87 IBLA 247 (June 20, 1985)

APPLICATIONS

In the absence of statutory authority, no "second entry" can be made under the Desert Land Act, 19 Stat. 377, 43 U.S.C. § 321 (1982). Under the regulation, 43 CFR 2521.1(b), right of desert land entry is exhausted by the making of an entry.

Paul W. Smith, 87 IBLA 247 (June 20, 1985)

A desert land entry application is properly rejected where the applicant fails to provide evidence of a right to the permanent use of sufficient water to irrigate and reclaim all of the irrigable portion of the land sought, or that he has initiated and prosecuted, as far as then possible, appropriate steps looking to the acquisition of such a right.

Albert W. Smith et al., 87 IBLA 253 (June 20, 1985)

DESERT LAND ENTRY--Continued

WATER RIGHT

It is premature for the Bureau of Land Management to reject petition/applications for desert land entries merely on the basis of informal information and belief that the State water authority will probably deny the applicants the right to appropriate groundwater for irrigation of the entries where the water authority has taken no official action on the water applications pending before it.

Julie A. Peterson et al., 86 IBLA 118 (Apr. 15, 1985)

A desert land entry application is properly rejected where the applicant fails to provide evidence of a right to the permanent use of sufficient water to irrigate and reclaim all of the irrigable portion of the land sought, or that he has initiated and prosecuted, as far as then possible, appropriate steps looking to the acquisition of such a right.

Albert N. Smith et al., 87 IBLA 253 (June 20, 1985)

ENDANGERED SPECIES ACT OF 1973

GENERALLY

When it has been determined a proposed action is located in an area occupied by a species identified as being threatened or endangered, the Department is required by 16 U.S.C. § 1536(a)(2) (1982) to assure any action authorized by it is not likely to jeopardize the continued existence of the threatened or endangered species, or result in the adverse modification of the critical habitat of such species, or seek an exemption pursuant to 16 U.S.C. § 1536(h) (1982). If a determination that approval of an application for a permit to drill an oil and gas well will result in "no jeopardy" is based upon the implementation of certain mitigating measures, the application for permission to drill may be approved only after it has been determined that the mitigating measures can be imposed upon necessary parties.

Glacier-Two Medicine Alliance et al., 88 IBLA 133 (Aug. 9, 1985)

SECTION 7

Generally

When it has been determined a proposed action is located in an area occupied by a species identified as being threatened or endangered, the Department is required by 16 U.S.C. § 1536(a)(2) (1982) to assure any action authorized by it is not likely to jeopardize the continued existence of the threatened or endangered species, or result in the adverse modification of the critical habitat of such species, or seek an exemption pursuant to 16 U.S.C. § 1536(h) (1982). If a determination that approval of an application for a permit to drill an oil and gas well will result in "no jeopardy" is based upon the implementation of certain mitigating measures, the application for permission to drill may be approved only after it has been determined that the mitigating measures can be imposed upon necessary parties.

Glacier-Two Medicine Alliance et al., 88 IBLA 133 (Aug. 9, 1985)

ENDANGERED SPECIES ACT OF 1973--Continued

SECTION 7--Continued

Critical Habitat

When it has been determined a proposed action is located in an area occupied by a species identified as being threatened or endangered, the Department is required by 16 U.S.C. § 1536(a)(2) (1982) to assure any action authorized by it is not likely to jeopardize the continued existence of the threatened or endangered species, or result in the adverse modification of the critical habitat of such species, or seek an exemption pursuant to 16 U.S.C. § 1536(h) (1982). If a determination that approval of an application for a permit to drill an oil and gas well will result in "no jeopardy" is based upon the implementation of certain mitigating measures, the application for permission to drill may be approved only after it has been determined that the mitigating measures can be imposed upon necessary parties.

Glacier-Two Medicine Alliance et al., 88 IBLA 133 (Aug. 9, 1985)

Mitigation

When it has been determined a proposed action is located in an area occupied by a species identified as being threatened or endangered, the Department is required by 16 U.S.C. § 1536(a)(2) (1982) to assure any action authorized by it is not likely to jeopardize the continued existence of the threatened or endangered species, or result in the adverse modification of the critical habitat of such species, or seek an exemption pursuant to 16 U.S.C. § 1536(h) (1982). If a determination that approval of an application for a permit to drill an oil and gas well will result in "no jeopardy" is based upon the implementation of certain mitigating measures, the application for permission to drill may be approved only after it has been determined that the mitigating measures can be imposed upon necessary parties.

Glacier-Two Medicine Alliance et al., 88 IBLA 133 (Aug. 9, 1985)

ENVIRONMENTAL POLICY ACT

Execution of a cooperative agreement between the Bureau of Land Management and a state wildlife management agency providing for study and preservation of wildlife habitat does not ordinarily constitute a proposal for major Federal action which may adversely affect the human environment requiring preparation of an environmental impact statement.

Lane County Audubon Society et al., 85 IBLA 185 (Feb. 26, 1985)

Approval of an application for a permit to drill has been identified by the Department as an action categorically excluded from the provisions of the National Environmental Policy Act requiring preparation of an environmental assessment (EA) or environmental impact statement (EIS). However, in exceptional circumstances approval of an application for a permit to drill raises sufficient concern to warrant the preparation of an EA. An EA is proper when there is reason to believe the proposed action might pose a threat to a threatened or endangered species.

A determination that a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of environmental problems has been made, relevant areas of environmental

ENVIRONMENTAL POLICY ACT--Continued

concern have been identified, and the final determination is reasonable. The party challenging a determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

The proximity of the proposed action to national park lands is a material factor to be considered in the analysis of the intensity or severity of the impact of the proposed action on the human environment. When the official having responsibility for managing parklands near the site of the proposed action expresses an opinion that the proposed action may or will adversely affect the park ecosystem, that opinion should be afforded substantial weight in the EA.

The degree to which the proposed action may be considered as highly controversial is a material factor to be considered in the analysis of the intensity or severity of the impact of the proposed action on the human environment. However, the mere fact that persons or organizations oppose the proposed action does not per se render the action "highly controversial," as the term properly refers to cases where a substantial dispute exists as to the size, nature, or effect of the action. Even when certain aspects of a proposed action may be deemed highly controversial, an EIS need not be prepared if the effects giving rise to the controversy have been adequately mitigated.

Connected action must be considered to be a part of the proposed action when determining whether a proposed action will have a significant effect on the human environment. Connected actions include those which: (i) automatically trigger other actions which may require an EIS; (ii) cannot or will not proceed unless other actions are undertaken previously or simultaneously; or (iii) are interdependent parts of a larger action and depend on the larger action for their justification.

When making a determination whether a proposed action will have a significant effect on the human environment, the cumulative effect of the proposed action and other actions not connected with the proposed action must be taken into consideration, even though, individually, the actions may be deemed insignificant. However, the possible impact of a speculative future action need not be considered when it can reasonably be assumed that such future action will not take place, or, if it will take place, an EA will be completed prior to a decision to take such action.

The adverse effects of a proposed action may be reduced to a point where they no longer have a significant impact upon the human environment by the implementation of mitigating measures. However, the agency imposing such additional requirements deemed necessary to mitigate the adverse effect of the proposed action must have the authority to enforce compliance with the mitigating measures imposed.

When it has been determined a proposed action is located in an area occupied by a species identified as being threatened or endangered, the Department is required by 16 U.S.C. § 1536(a)(2) (1982) to assure any action authorized by it is not likely to jeopardize the continued existence of the threatened or endangered species, or result in the adverse modification of the critical habitat of such species, or seek an exemption pursuant to 16 U.S.C. § 1536(h) (1982). If a determination that approval of an application for a permit to drill an oil and gas well will result in "no jeopardy" is based upon the implementation of certain mitigating measures, the application for permission to drill may

ENVIRONMENTAL POLICY ACT--Continued

be approved only after it has been determined that the mitigating measures can be imposed upon necessary parties.

When a finding that no significant impact will result from construction of a road to a drillsite is critically dependent upon the location of that road along a route avoiding critical habitat of a threatened or endangered species, a stipulation to the application for a permit to drill allowing the road to be relocated to avoid destruction of a cultural resource value is in conflict with the basis for determination that no significant impact will occur. The cultural resource stipulation must be amended to prohibit relocation of the road or require a supplemental EA prior to relocating the road.

Glacier-Two Medicine Alliance et al., 88 IBLA 133 (Aug. 9, 1985)

ENVIRONMENTAL QUALITY

GENERALLY

A provision in a readjusted coal lease requiring the lessee to conduct operations so as to avoid or, where avoidance is impracticable, to minimize and, where practicable, to repair, damage to Federal forage and timber, improvements including crops, of a surface owner, and improvements owned by the United States or by its permittees, licensees, or lessees, is appropriate and properly included in a lease readjustment.

It is proper to include in a readjusted coal lease a provision requiring the lessee to conduct at its own expense a survey and inventory of archaeological and paleontological values prior to approval of a mining plan or any activity that would disturb the surface of the land.

Kaiser Steel Corp., 87 IBLA 228 (June 19, 1985)

ENVIRONMENTAL STATEMENTS

A decision to issue oil and gas leases within an area of critical environmental concern pursuant to a categorical exclusion review will ordinarily be set aside and remanded for preparation of an environmental assessment where the categorical exclusion review discloses potential adverse impacts on threatened and endangered species. This constitutes an exception to the categorical exclusion review process under Departmental procedures, 516 DM 2, Append. 2, § 2.8.

Analysis of the impact of a proposed action under the National Environmental Policy Act, as amended, 42 U.S.C. § 4332 (1982), is required prior to an irrevocable commitment of resources. A decision deferring preparation of an environmental assessment and/or environmental impact statement in connection with issuance of a noncompetitive onshore oil and gas lease until such time as a site-specific plan of operations is submitted by the lessee may be affirmed where the lessee's right to surface occupancy is conditioned upon approval of a site-specific plan of operations in light of that environmental analysis.

Sierra Club Legal Defense Fund, Inc., Natural Resources Defense Council, Inc., California Wilderness Coalition, 84 IELA 311 (Jan. 7, 1985) 92 I.D. 37

ENVIRONMENTAL QUALITY--Continued

ENVIRONMENTAL STATEMENTS--Continued

Execution of a cooperative agreement between the Bureau of Land Management and a state wildlife management agency providing for study and preservation of wildlife habitat does not ordinarily constitute a proposal for major Federal action which may adversely affect the human environment requiring preparation of an environmental impact statement.

Lane County Audubon Society et al., 85 IBLA 165 (Feb. 26, 1985)

Approval of an application for a permit to drill has been identified by the Department as an action categorically excluded from the provisions of the National Environmental Policy Act requiring preparation of an environmental assessment (EA) or environmental impact statement (EIS). However, in exceptional circumstances approval of an application for a permit to drill raises sufficient concern to warrant the preparation of an EA. An EA is proper when there is reason to believe the proposed action might pose a threat to a threatened or endangered species.

A determination that a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination is reasonable. The party challenging a determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

The proximity of the proposed action to national park lands is a material factor to be considered in the analysis of the intensity or severity of the impact of the proposed action on the human environment. When the official having responsibility for managing parklands near the site of the proposed action expresses an opinion that the proposed action may or will adversely affect the park ecosystem, that opinion should be afforded substantial weight in the EA.

The degree to which the proposed action may be considered as highly controversial is a material factor to be considered in the analysis of the intensity or severity of the impact of the proposed action on the human environment. However, the mere fact that persons or organizations oppose the proposed action does not per se render the action "highly controversial," as the term properly refers to cases where a substantial dispute exists as to the size, nature, or effect of the action. Even when certain aspects of a proposed action may be deemed highly controversial, an EIS need not be prepared if the effects giving rise to the controversy have been adequately mitigated.

Connected action must be considered to be a part of the proposed action when determining whether a proposed action will have a significant effect on the human environment. Connected actions include those which: (i) automatically trigger other actions which may require an EIS; (ii) cannot or will not proceed unless other actions are undertaken previously or simultaneously; or (iii) are interdependent parts of a larger action and depend on the larger action for their justification.

When making a determination whether a proposed action will have a significant effect on the human environment, the cumulative effect of the proposed action and other actions not connected with the proposed action must be taken into consideration, even though, individually, the actions may be deemed insignificant. However, the possible impact of a

ENVIRONMENTAL QUALITY--Continued

ENVIRONMENTAL STATEMENTS--Continued

speculative future action need not be considered when it can reasonably be assumed that such future action will not take place, or, if it will take place, an EA will be completed prior to a decision to take such action.

The adverse effects of a proposed action may be reduced to a point where they no longer have a significant impact upon the human environment by the implementation of mitigating measures. However, the agency imposing such additional requirements deemed necessary to mitigate the adverse effect of the proposed action must have the authority to enforce compliance with the mitigating measures imposed.

When it has been determined a proposed action is located in an area occupied by a species identified as being threatened or endangered, the Department is required by 16 U.S.C. § 1536(a)(2) (1982) to assure any action authorized by it is not likely to jeopardize the continued existence of the threatened or endangered species, or result in the adverse modification of the critical habitat of such species, or seek an exemption pursuant to 16 U.S.C. § 1536(h) (1982). If a determination that approval of an application for a permit to drill an oil and gas well will result in "no jeopardy" is based upon the implementation of certain mitigating measures, the application for permission to drill may be approved only after it has been determined that the mitigating measures can be imposed upon necessary parties.

When a finding that no significant impact will result from construction of a road to a drillsite is critically dependent upon the location of that road along a route avoiding critical habitat of a threatened or endangered species, a stipulation to the application for a permit to drill allowing the road to be relocated to avoid destruction of a cultural resource value is in conflict with the basis for determination that no significant impact will occur. The cultural resource stipulation must be amended to prohibit relocation of the road or require a supplemental EA prior to relocating the road.

Glacier-Two Medicine Alliance et al., 88 IBLA 133 (Aug. 9, 1985)

Where review of the environmental consequences of a proposed action discloses gaps in relevant information or scientific uncertainty, the gaps or uncertainty must be disclosed. If the information relative to adverse impacts is essential to a reasoned choice among alternatives and the cost of obtaining it is exorbitant, the agency shall weigh the need for the action against the risk and severity of possible adverse impacts. Such consideration shall include a worst-case analysis and an indication of the probability or improbability of its occurrence.

The presence of gaps in information regarding the adverse effects of a herbicide on the human environment may stem from lack of knowledge as well as from a dispute among experts regarding the inferences to be drawn from existing information.

Federal action within the meaning of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4361 (1982), may be found not only where an agency proposes to undertake an action itself, but also where an agency makes a decision which permits action by another party. Ordinarily some overt act by a federal agency in support of another party's action is required to establish federal action. Federal action may be found where there is federal funding as well as federal approval of action conducted by state and local authorities on the public domain.

Idaho Natural Resources Legal Foundation, 88 IBLA 201 (Aug. 28, 1985)

ENVIRONMENTAL QUALITY--Continued

HERBICIDES

Where review of the environmental consequences of a proposed action discloses gaps in relevant information or scientific uncertainty, the gaps or uncertainty must be disclosed. If the information relative to adverse impacts is essential to a reasoned choice among alternatives and the cost of obtaining it is exorbitant, the agency shall weigh the need for the action against the risk and severity of possible adverse impacts. Such consideration shall include a worst-case analysis and an indication of the probability or improbability of its occurrence.

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Idaho Natural Resources Legal Foundation, 88 IBLA 201 (Aug. 28, 1985)

ESTOPPEL

Reliance upon erroneous advice provided by Federal employees cannot create rights not authorized by law.

Silver Buckle Mines, Inc., 84 IBLA 306 (Jan. 7, 1985)

The United States is not barred by the equitable defenses of estoppel and laches from enforcing public land laws. Moreover, BLM owes no duty to mining claimants to promptly ascertain the legal status of every claim filed and inform such claimants of its findings.

Hugh B. Fate, Jr., et al., 86 IBLA 215 (Apr. 30, 1985)

An essential element of a claim for estoppel is that the party asserting it must be ignorant of the true facts. Since, however, all persons are presumed to have knowledge of relevant statutory and regulatory provisions, an individual may not premise a claim of estoppel on information or advice contrary to such a provision.

Marion E. Banks, Noble Craver, & August Carniglia, 88 IBLA 341 (Sept. 19, 1985)

EVIDENCE

GENERALLY

In determining whether or not a unit well is capable of producing unitized substances in paying quantities a "preponderance of the evidence" standard of proof must be employed. In determining whether or not one has met the applicable standard of proof, this Board will consider the actual standard applied rather

EVIDENCE--Continued

GENERALLY--Continued

than the phrase employed by the factfinder to describe it.

Woods Petroleum Co., 86 IBLA 46 (Apr. 10, 1985)

It is premature for the Bureau of Land Management to reject petition/applications for desert land entries merely on the basis of informal information and belief that the State water authority will probably deny the applicants the right to appropriate groundwater for irrigation of the entries where the water authority has taken no official action on the water applications pending before it.

Julie A. Peterson et al., 86 IBLA 118 (Apr. 15, 1985)

In order to prove livestock trespass upon public lands alleged to have occurred when excessive numbers of cattle were grazed upon allotments of public land permitted for lesser numbers, some actual trespass must be shown to have taken place before the "access trespass presumption" can be applied to calculate damages.

Bureau of Land Management v. David & Bonnie Ericsson, 88 IBLA 248 (Sept. 4, 1985)

BURDEN OF PROOF

Where the reasonable rental value of Government-furnished quarters has been determined in accordance with accepted appraisal procedures pursuant to Departmental directives, and the occupant alleges that his rent is excessive, the burden is on the occupant to prove by positive, specific, and substantial evidence that the appraisal is in error.

Appeal of James P. Glynn, 6 OHA 13 (Feb. 6, 1985)

When the Government rejects a competitive oil and gas lease high bid because it was less than the presale tract valuation, the bidder must not only disprove the Government's fair market estimates, but must also prove that his bids constitute fair market value. However, appellant does not bear this burden until after the Government has established a prima facie case supporting its estimates.

Burton/Hawks, Inc., 85 IBLA 193 (Feb. 27, 1985)

When the Government contests a mining claim on the basis of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case as to that charge. A prima facie case has been made when a Government mineral examiner testifies that he has examined the exposed workings on a claim and has found the evidence of mineralization insufficient to support a finding of discovery of a valuable mineral deposit. The mining claimant has the ultimate burden of refuting the Government's case by a preponderance of evidence.

United States v. Clyde L. Weekley, 86 IBLA 1 (Mar. 29, 1985)

EVIDENCE--Continued

BURDEN OF PROOF--Continued

There is a presumption of regularity which supports the official acts of public officers in the proper discharge of their duties. When an appellant asserts the affidavit of annual assessment work was mailed to BLM, but lost, appellant must submit evidence that it was received by BLM in order to overcome this presumption.

Carmelita M. Holland, 87 IBLA 175 (June 13, 1985)

The burden of proof is on an appellant to show error in the decision appealed from and, in the absence of such a showing, the decision will be affirmed.

Wells J. Borvereid, 88 IBLA 345 (Sept. 24, 1985)

PREPONDERANCE

In determining whether or not a unit well is capable of producing unitized substances in paying quantities a "preponderance of the evidence" standard of proof must be employed. In determining whether or not one has met the applicable standard of proof, this Board will consider the actual standard applied rather than the phrase employed by the factfinder to describe it.

Woods Petroleum Co., 86 IBLA 46 (Apr. 10, 1985)

PRESUMPTIONS

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents filed with them is rebuttable by probative evidence to the contrary. However, an affidavit that evidence of assessment work was timely filed with the proper BLM office must ordinarily be corroborated by other evidence to establish filing where there is no evidence of receipt of the documents in the file.

John R. Wellborn, Clara Joe Wellborn, 87 IBLA 20 (May 21, 1985)

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents filed with them is rebuttable by probative evidence to the contrary. However, the presumption is not overcome by submission of a statement that a document was mailed. Rather, BLM's denial of receipt of a document can be rebutted only by probative evidence.

James Boatman, 87 IBLA 31 (May 22, 1985)

The presumption that BLM employees have not lost or misplaced evidence of annual assessment work for an unpatented mining claim, required to be filed by a certain date under sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), will not be overcome by an affidavit that the document was mailed with another document which was received.

Cascade Energy & Metals Corp., Rex Montis Silver Co., 87 IBLA 113 (May 31, 1985)

EVIDENCE--Continued

PRESUMPTIONS--Continued

There is a presumption of regularity which supports the official acts of public officers in the proper discharge of their duties. When an appellant asserts the affidavit of annual assessment work was mailed to BLM, but lost, appellant must submit evidence that it was received by BLM in order to overcome this presumption.

Carmelita M. Holland, 87 IBLA 175 (June 13, 1985)

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents filed with them is rebuttable by probative evidence to the contrary. However, a statement that evidence of assessment work was timely filed with the proper BLM office must ordinarily be corroborated by other evidence to establish filing where there is no evidence of receipt of the document in the file.

Larry C. Hoffman, 87 IBLA 225 (June 19, 1985)

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally sufficient documents filed with them is rebuttable by probative evidence to the contrary. The presumption is not overcome by a statement, without corroborating evidence, that a document was mailed.

Howard Gates, 87 IBLA 261 (June 21, 1985)

The presumption that BLM employees have not lost or misplaced evidence of annual assessment work for an unpatented mining claim, required to be filed under sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), will not be overcome by an uncorroborated statement that the document was mailed.

Augustine V. Manzanares et al., 87 IBLA 328 (June 26, 1985)

The legal presumption of regularity that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents filed with them is rebuttable by probative evidence to the contrary. However, an uncorroborated statement that an affidavit of assessment work was timely filed with the proper BLM office is insufficient to overcome that presumption.

Ronald Edwards, 87 IBLA 367 (June 27, 1985)

Jack Bolke, Paul Pilch, 88 IBLA 58 (July 17, 1985)

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced documents filed with them is rebuttable by probative evidence to the contrary. The presumption is not overcome by a statement, without corroborating evidence, that a document was mailed.

Fern L. Evans, Gary L. Carter, 88 IBLA 45 (July 10, 1985)

EVIDENCE--Continued

PRESUMPTIONS--Continued

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally sufficient documents filed with them is rebuttable by probative evidence to the contrary. The presumption is not overcome by an uncorroborated statement that a document was mailed.

George W. Wagner, Hazel T. Wagner, 88 IBLA 117 (July 31, 1985)

Failure to file instruments required by 43 U.S.C. § 1744 (1982) and 43 CFR 3833.2 in the proper BLM office within the time period prescribed results in a conclusive presumption of abandonment of the mining claim. The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced documents filed with them is rebuttable by probative evidence to the contrary. The presumption is not overcome by a statement, without corroborating evidence, that a document was mailed.

John D. O'Keefe (On Reconsideration), 88 IBLA 157

The legal presumption that administrative officials have properly discharged their official duties and not lost legally significant documents filed with them may be rebutted by sufficient probative evidence that a particular document was not only transmitted but received by the proper office. When it is asserted that a particular document is one of multiple documents filed with BLM, proving receipt of some of the multiple documents does not prove receipt of the unaccounted-for document.

Neal R. Foster et al., 88 IBLA 296 (Sept. 13, 1985)

The inference that evidence of assessment work was not timely filed with the Bureau of Land Management (BLM) arising from the absence of such a document from the case file coupled with the presumption that BLM officials have not lost legally significant documents filed with BLM may be overcome by probative evidence to the contrary.

Wells J. Horvereid, 88 IBLA 345 (Sept. 24, 1985)

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents filed with them is rebuttable by probative evidence to the contrary. However, an allegation that evidence of assessment work was timely filed with the proper BLM office must ordinarily be corroborated by other evidence to establish filing where there is no evidence of receipt of the documents in the file.

Ralph C. Memmott, 88 IBLA 372 (Sept. 27, 1985)

PRIMA FACIE CASE

When the Government contests a mining claim on a charge of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case. Where a Government mineral examiner testifies that he has examined the land within a claim and found the quantity and quality of the minerals insufficient to support a finding of discovery, a prima facie case is established.

United States v. Craig Anderson, 88 IBLA 316 (Sept. 18, 1985)

EVIDENCE--Continued

SUFFICIENCY

In determining whether or not a unit well is capable of producing unitized substances in paying quantities a "preponderance of the evidence" standard of proof must be employed. In determining whether or not one has met the applicable standard of proof, this Board will consider the actual standard applied rather than the phrase employed by the factfinder to describe it.

A hearing is not necessary in the absence of a material issue of fact, which, if proven, would alter the disposition of the matter. A hearing is not necessary where the dispute does not involve facts, but involves the proper application and interpretation of those facts, and the Bureau of Land Management properly reviewed the same information submitted to this Board.

Woods Petroleum Co., 86 IBLA 46 (Apr. 10, 1985)

Pursuant to 43 CFR 2650.4-7(a)(3), an easement for public access may not be reserved across Native lands where there exists a reasonable alternative route of transportation across publicly owned lands. Where the reasonableness of an alternative route decided upon by BLM is challenged on appeal and the facts of record are insufficient to determine whether BLM's decision should be affirmed, this Board has the discretionary authority to order a hearing in the matter before an Administrative Law Judge, pursuant to 43 CFR 4.415.

State of Alaska, 86 IBLA 263 (May 10, 1985)

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents filed with them is rebuttable by probative evidence to the contrary. However, an affidavit that evidence of assessment work was timely filed with the proper BLM office must ordinarily be corroborated by other evidence to establish filing where there is no evidence of receipt of the documents in the file.

John R. Wellborn, Clara Joe Wellborn, 87 IBLA 20 (May 21, 1985)

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents filed with them is rebuttable by probative evidence to the contrary. However, the presumption is not overcome by submission of a statement that a document was mailed. Rather, BLM's denial of receipt of a document can be rebutted only by probative evidence.

James Boatman, 87 IBLA 31 (May 22, 1985)

There is a presumption of regularity which supports the official acts of public officers in the proper discharge of their duties. When an appellant asserts the affidavit of annual assessment work was mailed to BLM, but lost, appellant must submit evidence that it was received by BLM in order to overcome this presumption.

Carmelita M. Holland, 87 IBLA 175 (June 13, 1985)

EVIDENCE--Continued

SUFFICIENCY--Continued

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents filed with them is rebuttable by probative evidence to the contrary. However, a statement that evidence of assessment work was timely filed with the proper BLM office must ordinarily be corroborated by other evidence to establish filing where there is no evidence of receipt of the document in the file.

Larry C. Hoffman, 87 IBLA 225 (June 19, 1985)

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally sufficient documents filed with them is rebuttable by probative evidence to the contrary. The presumption is not overcome by a statement, without corroborating evidence, that a document was mailed.

Howard Gates, 87 IBLA 261 (June 21, 1985)

The legal presumption of regularity that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents filed with them is rebuttable by probative evidence to the contrary. However, an uncorroborated statement that an affidavit of assessment work was timely filed with the proper BLM office is insufficient to overcome that presumption.

Ronald Edwards, 87 IBLA 367 (June 27, 1985)

Jack Bolke, Paul Pilch, 88 IBLA 58 (July 17, 1985)

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced documents filed with them is rebuttable by probative evidence to the contrary. The presumption is not overcome by a statement, without corroborating evidence, that a document was mailed.

Fern L. Evans, Gary L. Carter, 88 IBLA 45 (July 10, 1985)

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally sufficient documents filed with them is rebuttable by probative evidence to the contrary. The presumption is not overcome by an uncorroborated statement that a document was mailed.

George W. Wagner, Hazel T. Wagner, 88 IBLA 117 (July 31, 1985)

The legal presumption that administrative officials have properly discharged their official duties and not lost legally significant documents filed with them may be rebutted by sufficient probative evidence that a particular document was not only transmitted but received by the proper office. When it is asserted that a particular document is one of multiple documents filed with BLM, proving receipt of some of the multiple documents does not prove receipt of the unaccounted-for document.

Neal R. Foster et al., 88 IBLA 296 (Sept. 13, 1985)

EVIDENCE--Continued

SUFFICIENCY--Continued

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents filed with them is rebuttable by probative evidence to the contrary. However, an allegation that evidence of assessment work was timely filed with the proper BLM office must ordinarily be corroborated by other evidence to establish filing where there is no evidence of receipt of the documents in the file.

Ralph C. Hemmott, 88 IBLA 372 (Sept. 27, 1985)

EXCHANGES OF LAND

GENERALLY

Where the record in a private exchange case reflects that BLM considered the wildlife values of the public lands subject to exchange and determined them to be not significant, a claim that such lands are of critical importance to wildlife cannot be sustained where there is a failure to provide persuasive evidence that BLM's analysis of the wildlife values is improper.

The denial of a protest to a private land exchange will be upheld where BLM determines that the public interest is well served by proceeding with the exchange and the protestant fails to show BLM erred in that determination.

Where the Environmental Assessment/Land Report of a private land exchange reflects that BLM considered the alternative of imposing a conservation easement or land use covenant to protect wildlife values on the public land subject to exchange, but BLM's analysis results in the conclusion that such a restriction is not warranted, such a determination will not be overturned in the absence of a showing of error.

Nat'l Wildlife Federation et al., 87 IBLA 271 (June 25, 1985)

Where BLM denies a protest to a proposed private land exchange, it must inform the protestant of its right to appeal. The right of appeal is not dependent upon BLM's determination of whether the protestant claims ownership of public lands in the proposal or holds a valid existing contract, permit or lease for those lands. Denial of a protest makes the protestant a "party to a case" within the meaning of 43 CFR 4.410. Whether a party to a case has an interest which has been adversely affected by the BLM decision is a matter to be decided by the Board of Land Appeals on appeal.

Steinheimer Trust, 87 IBLA 308 (June 25, 1985)

FEDERAL EMPLOYEES AND OFFICERS

GENERALLY

Where the reasonable rental value of Government-furnished quarters has been determined in accordance with accepted appraisal procedures pursuant to Departmental directives, and the occupant alleges that his rent is excessive, the burden is on the occupant to prove by positive, specific, and substantial evidence that the appraisal is in error.

Appeal of James P. Glynn, 6 OHA 13 (Feb. 6, 1985)

FEDERAL EMPLOYEES AND OFFICERS--Continued

AUTHORITY TO BIND GOVERNMENT

Reliance upon erroneous advice provided by Federal employees cannot create rights not authorized by law.

Silver Buckle Mines, Inc., 84 IBLA 306 (Jan. 7, 1985)

Where the record indicates full compliance with an earlier decision of this Board involving the same parties and issues, and the only remaining complaint is the fact that no meetings with appellants were held, the appeal will be denied; no such meetings are mandated by 41 CFR 102.7. See 4 CFR 101.8.

Appeal of Henry Mountain Resource Area Employees, II, 6 OHA 80 (Sept. 9, 1985)

INTEREST IN LANDS

Location of a mining claim is a purchase of public land within the meaning of 43 U.S.C. § 11 (1982) and the claim may be declared void where it is shown that the locator's spouse who is an employee of the Bureau of Land Management (BLM) has a direct or indirect interest in the claim because "an act done in violation of a statutory prohibition is void and confers no right upon the wrongdoer."

A mining claim is properly declared to be void ab initio, in accordance with 43 CFR 20.735-24, where the locator is the spouse of a BLM employee and the mining claim is located on land administered or controlled by the U.S. Department of the Interior.

Because the Department of the Interior retains control over the validity of mining claims on U.S. Forest Service lands administered by the Department of Agriculture, location of mining claims by the spouse of a BLM employee on such lands is prohibited by 43 CFR 20.735-24.

George R. Schultz et al., 85 IBLA 77 (Feb. 14, 1985) 92 I.D. 83

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976

GENERALLY

The language of sec. 601(f) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1781(f) (1982), was intended by Congress to have application to patents issued to mining claims which had been perfected after passage of the Act. A patent to a mining claim which had been perfected prior to passage of the Act should, therefore, not contain the restrictive language contemplated by sec. 601(f).

Lee Chemicals, 86 IBLA 164 (Apr. 25, 1985)

The Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a)(2) (1982), and 43 CFR 3833.1-2 require that a mining claimant file with BLM a description of the location of the mining claim sufficient to locate the claimed lands. Where a mining claimant fails to provide such a description with the recordation of the claim, BLM may properly require the filing of such a description within a certain period of time. The failure by the mining claimant to comply with such a request may be considered grounds for declaring the claim abandoned and void in accordance with 43 CFR 3833.4; however, where the claimant provides a map, narrative, or sketch of sufficient

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

GENERALLY--Continued

detail to identify and locate the claims on the ground, it is improper to declare the claims abandoned and void.

Floyd & Elsie Patrin, 87 IBLA 152 (June 11, 1985)

ASSESSMENT WORK

Under the provisions of 43 U.S.C. § 1744 (1982), an owner of an unpatented mining claim must file evidence of annual assessment work or notice of intention to hold prior to Dec. 31 of each year. Such filings must be made within each calendar year, i.e., on or after Jan. 1 and on or before Dec. 30. Failure to file within the calendar year properly results in the claim being extinguished, and therefore abandoned and void.

Samuel A. Wright, 86 IBLA 286 (May 13, 1985)

J. E. Stevens, 86 IBLA 291 (May 13, 1985)

Under the provisions of 43 U.S.C. § 1744 (1982), an owner of an unpatented mining claim must file evidence of annual assessment work or notice of intention to hold prior to Dec. 31 of each year. Such filings must be made within each calendar year, i.e., on or after Jan. 1 and on or before Dec. 30. Failure to file within the calendar year properly results in the claim being extinguished, and therefore abandoned and void.

Failure of a lessee or agent of the owner of an unpatented mining claim to make the filings required by 43 U.S.C. § 1744 (1982) provides no basis for reversal of a decision declaring the claim abandoned and void. Congress assigned the owner of the claim the responsibility of making the required filings; the owner must bear the consequence of filings not timely made.

Comstock Tunnel & Drainage Co. & Sutro Tunnel Co., 87 IBLA 132 (June 7, 1985)

Under the provisions of 43 U.S.C. § 1744 (1982), a mining claimant must file evidence of annual assessment work or a notice of intention to hold each year in a timely manner. Failure to file results in the claim being extinguished, and therefore abandoned and void.

Good Hope Development Co., 87 IBLA 341 (June 26, 1985)

When a claimant fails to timely file an affidavit of assessment work or notice of intent to hold, the Board lacks authority to excuse lack of compliance, extend the time for compliance, or afford any relief from the statutory consequences.

Mine Management Corp., 88 IBLA 311 (Sept. 18, 1985)

CALIFORNIA DESERT CONSERVATION AREA

The language of sec. 601(f) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1781(f) (1982), was intended by Congress to have application to patents issued to mining claims which had been perfected after passage of the Act. A patent to a mining claim which had been perfected prior to passage of the Act should, therefore, not contain the restrictive language contemplated by sec. 601(f).

Lee Chemicals, 86 IBLA 164 (Apr. 25, 1985)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

DISCLAIMERS OF INTEREST

Notwithstanding a finding that the United States has no right, title, or interest in or to the lands at issue, an application by the owner of record for a recordable disclaimer of interest by the United States pursuant to 43 U.S.C. § 1745 (1982) must be rejected where the record shows that more than 12 years have elapsed since the owner/applicant and his predecessors knew or should have known of the alleged claim attributed to the United States, because 43 CFR 1864.1-3 mandates rejection of such applications.

Robert R. Perry, 87 IBLA 380 (June 28, 1985)

EXCHANGES

Where the proponent of a land exchange raises substantial questions concerning the accuracy of a BLM appraisal of the value of the selected land, including the use of appropriate comparable sales, the need to apply a discount to financed transactions and the extent of adjustments to assure comparability for the cost of bringing in utilities and modifying topography, the case will be referred to the Hearings Division for a fact-finding hearing.

Fallon Ice & Cold Storage Co., Willow Lane Corp., 85 IBLA 224 (Feb. 28, 1985)

Where the record in a private exchange case reflects that BLM considered the wildlife values of the public lands subject to exchange and determined them to be not significant, a claim that such lands are of critical importance to wildlife cannot be sustained where there is a failure to provide persuasive evidence that BLM's analysis of the wildlife values is improper.

The denial of a protest to a private land exchange will be upheld where BLM determines that the public interest is well served by proceeding with the exchange and the protestant fails to show BLM erred in that determination.

Where the Environmental Assessment/Land Report of a private land exchange reflects that BLM considered the alternative of imposing a conservation easement or land use covenant to protect wildlife values on the public land subject to exchange, but BLM's analysis results in the conclusion that such a restriction is not warranted, such a determination will not be overturned in the absence of a showing of error.

Nat'l Wildlife Federation et al., 87 IBLA 271 (June 25, 1985)

Where BLM denies a protest to a proposed private land exchange, it must inform the protestant of its right to appeal. The right of appeal is not dependent upon BLM's determination of whether the protestant claims ownership of public lands in the proposal or holds a valid existing contract, permit or lease for those lands. Denial of a protest makes the protestant a "party to a case" within the meaning of 43 CFR 4.410. Whether a party to a case has an interest which has been adversely affected by the BLM decision is a matter to be decided by the Board of Land Appeals on appeal.

Where BLM denies a request by a private land owner for access across Federal lands selected in a private exchange proposal on the basis that historical access to the private lands has been across other private lands not associated with the exchange and that the requested access would provide no public benefit, such a determination will be upheld where the one

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

EXCHANGES--Continued

seeking access fails to establish error in the BLM determination.

Steinheimer Trust, 87 IBLA 308 (June 25, 1985)

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM

The Supreme Court has definitively established in United States v. Locke, 53 U.S.L.W. 4433 (Apr. 2, 1985), that the provisions of sec. 314 of FLPMA, which provide that, upon the failure of a mining claimant to timely file annually either evidence of the performance of annual assessment work or a notice of intention to hold a mining claim, the claim is conclusively deemed abandoned and void, is constitutional and does not result in a deprivation of due process of law.

Lanny Ray Southard, 86 IBLA 239 (Apr. 30, 1985)

Where a mining claimant apparently inadvertently omits the serial number of two claims from the affidavit of annual labor and there is no other means of identifying the claims on the document, BLM properly declares the claims abandoned and void for failure to comply with 43 CFR 3833.2.

Arley R. Taylor, 86 IBLA 283 (May 13, 1985)

Under the provisions of 43 U.S.C. § 1744 (1982), an owner of an unpatented mining claim must file evidence of annual assessment work or notice of intention to hold prior to Dec. 31 of each year. Such filings must be made within each calendar year, i.e., on or after Jan. 1 and on or before Dec. 30. Failure to file within the calendar year properly results in the claim being extinguished, and therefore abandoned and void.

Charles H. Hagerty, 87 IBLA 23 (May 21, 1985)

Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), the owner of an unpatented mining claim located on public land must file a notice of intention to hold the mining claim or evidence of annual assessment work on the claim prior to Dec. 31 of each year in the proper office of the Bureau of Land Management. There is no provision for waiver of this mandatory requirement, and where evidence of assessment work is not timely filed, for whatever reason, the consequence must be borne by the claimant.

The Supreme Court has definitively established in United States v. Locke, 105 S. Ct. 1785 (1985), that the provisions of sec. 314 of the Federal Land Policy and Management Act of 1976, which provide that, upon the failure of a mining claimant to timely file annually either evidence of the performance of annual assessment work or a notice of intention to hold a mining claim, the claim is conclusively deemed abandoned and void, is constitutional and does not result in a deprivation of due process of law.

Charlene & Robert Schilling, 87 IBLA 52 (May 23, 1985)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM--Continued

Failure to file evidence of annual assessment work in calendar year 1981 for a mining claim located before Oct. 21, 1976, as required by sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), and 43 CFR 3833.2-1(a) (1981), constitutes abandonment of the claim and renders it void. Personal delivery of such evidence after regular business hours on Dec. 30, 1981, does not constitute compliance with the recordation requirement where the document is deemed by 43 CFR 1821.2-2(d) to have been filed on the next business day, Dec. 31.

United States v. Richard R. Ballas, 87 IBLA 88 (May 30, 1985)

BLM may properly declare an unpatented mining claim located prior to 1982 abandoned and void under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), where the owner failed to file either evidence of annual assessment work or a notice of intention to hold the claim with BLM on or before Dec. 30, 1982.

The presumption that BLM employees have not lost or misplaced evidence of annual assessment work for an unpatented mining claim, required to be filed by a certain date under sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), will not be overcome by an affidavit that the document was mailed with another document which was received.

Cascade Energy & Metals Corp., Rex Montis Silver Co., 87 IBLA 113 (May 31, 1985)

When Congress enacted sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), it intended to extinguish those claims for which timely filings were not made. Evidence of subjective intent to hold the claims is not relevant, as the failure to file an affidavit of assessment work or notice of intent to hold in a timely manner, in and of itself, causes the claim to be lost. The statute specifically provides that failure to comply with applicable filing requirements leads automatically to loss of the claim.

For the purposes of 43 CFR 3833.2-1, "timely filing" means being filed within the time period prescribed by law, or received by Jan. 19, after the period prescribed by law, in an envelope bearing a clear postmark affixed by the United States Postal Service bearing a date within the period prescribed by law. When documents submitted for filing have been lost in the mail and thus not received by BLM, such loss must be borne by the claimant.

Paul E. Hammond, 87 IBLA 139 (June 10, 1985)

To comply with 43 U.S.C. § 1744 (1982), the owner of an unpatented mining claim located on public land must file his evidence of annual assessment work on the claim prior to Dec. 31 of each year in the proper office of BLM. By regulation 43 CFR 3833.0-5(m), the Department has considered such documents to be timely filed if placed in an envelope postmarked by the United States Postal Service on or before Dec. 30 and received in the proper BLM office on or before the following Jan. 19. Where the envelope containing the necessary documentation is postmarked Dec. 31, the claim is properly declared abandoned and void.

J. W. Doyle, 87 IBLA 158 (June 11, 1985)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM--Continued

BLM may not declare an unpatented mining claim abandoned and void for failure to file a notice of intention to hold the claim with both the local recording office and BLM on or before Oct. 22, 1979, where the claimant has already filed within the 3-year period following Oct. 21, 1976, pursuant to sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), thereby initiating the statutory requirement to file prior to Dec. 31 of each year thereafter.

Bernice Sheldon, 87 IBLA 161 (June 11, 1985)

In United States v. Locke, 105 S. Ct. 1785 (1985), the United States Supreme Court held that sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), is constitutional. Sec. 314 provides that upon the failure of a mining claimant to timely file either evidence of the performance of annual assessment work or a notice of intention to hold a mining claim, the claim is conclusively presumed to be abandoned and void. Therefore, a mining claimant is not deprived of due process where his claim is rendered abandoned and void for failure to timely make the required filing.

Myron Cherry, 87 IBLA 165 (June 12, 1985)

BLM may properly declare an unpatented mining claim located after Oct. 21, 1976, abandoned and void where the claimant failed to file either evidence of annual assessment work or a notice of intention to hold the claim prior to Dec. 31 of the year following the year in which the claim was located, as required by sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982).

Golden Triangle Exploration Co., 87 IBLA 191 (June 13, 1985)

Sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), requires the owner of an unpatented mining claim located prior to Oct. 21, 1976, to file evidence of annual assessment work or notice of intention to hold with the Bureau of Land Management on or before Oct. 22, 1979, and on or before Dec. 30 of each year thereafter. This requirement is mandatory and the failure to comply is deemed conclusively to constitute an abandonment of the claim by the owner and render the claim void.

Glenn & Barbara Kroshus, 87 IBLA 213 (June 18, 1985)

Arno W. Myrtz, 88 IBLA 19 (July 1, 1985)

Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), the owner of an unpatented mining claim located on public land must file a notice of intention to hold the mining claim or evidence of annual assessment work on the claim prior to Dec. 31 of each year in the proper office of the Bureau of Land Management. There is no provision for waiver of this mandatory requirement, and where evidence of assessment work is not timely filed, for whatever reason, the consequence must be borne by the claimant.

Larry C. Hoffman, 87 IBLA 225 (June 19, 1985)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM--Continued

BLM may properly declare an unpatented mining claim abandoned and void pursuant to sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), where the claimant failed to file either evidence of annual assessment work or a notice of intention to hold the claim for 1982 prior to Dec. 31, 1982.

Ronald H. Vowell et al., 87 IBLA 293 (June 25, 1985)

BLM may properly declare an unpatented mining claim abandoned and void under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), where the owner failed to file with BLM either evidence of annual assessment work or a notice of intention to hold the claim prior to Dec. 31 of each calendar year.

The presumption that BLM employees have not lost or misplaced evidence of annual assessment work for an unpatented mining claim, required to be filed under sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), will not be overcome by an uncorroborated statement that the document was mailed.

Augustine V. Manzanares et al., 87 IBLA 328 (June 26, 1985)

The owner of a mining claim located after Oct. 21, 1976, is required by sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), to file a notice of intention to hold the claim or evidence of assessment work performed on the claim, in the county where the location notice is of record and in the proper office of BLM prior to Dec. 31 of each year following the calendar year in which the claim is located. Failure to file the instrument required by the statute constitutes an abandoment of the claim.

Gloria T. Bruce, C. Vince Bruce, 87 IBLA 338 (June 26, 1985)

Failure to file instruments required by 43 U.S.C. § 1744 (1982) and 43 CFR 3833.2 in the proper BLM office within the time prescribed constitutes abandonment of the mining claim.

Ronald Edwards, 87 IBLA 367 (June 27, 1985)

Neal R. Foster et al., 88 IBLA 296 (Sept. 13, 1985)

Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), the owner of an unpatented mining claim located on Federal lands must file a notice of intention to hold the mining claim or evidence of annual assessment work on the claim prior to Dec. 31 of each year in the proper office of the Bureau of Land Management. There is no provision for waiver of this mandatory requirement, and where evidence of assessment work is not timely filed, for whatever reason, the consequence must be borne by the claimant.

Pursuant to 43 CFR 3833.0-5(m), a proof of labor or notice of intention to hold will not be deemed as timely filed where it is mailed in an envelope bearing a clearly dated postmark affixed by the United States

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM--Continued

Postal Service prior to Dec. 31, within the period prescribed by law, but is not delivered to the proper BLM office by Jan. 19 immediately following.

Alice R. Kirk, 88 IBLA 4 (June 28, 1985)

Failure to file an instrument required by 43 U.S.C. § 1744 (1982) and 43 CFR 3833.2 in the proper BLM office within the time prescribed constitutes abandonment of the mining claim.

William J. Fairse, Glenn Fairse, 88 IBLA 22 (July 2, 1985)

A decision declaring an unpatented mining claim located after Oct. 21, 1976, abandoned and void pursuant to sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), will be affirmed where the affidavit of assessment work due on or before Dec. 30, 1983, although filed prior to Jan. 19, 1984, was not received in an envelope postmarked prior to Dec. 31, 1983, such that the claimant can take advantage of 43 CFR 3833.0-5(m).

David H. Holt, 88 IBLA 36 (July 9, 1985)

BLM may properly declare an unpatented mining claim located in 1977 abandoned and void under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), where the owner failed to file with BLM either evidence of annual assessment work or a notice of intention to hold the claim prior to Dec. 31 of each calendar year following the calendar year in which the claim was located.

Jack Bolke, Paul Pilch, 88 IBLA 58 (July 17, 1985)

BLM may properly declare an unpatented mining claim filed for recordation in 1979 abandoned and void under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), where the owner fails to file with BLM either evidence of annual assessment work or a notice of intention to hold the claim on or before Dec. 31 of calendar years 1980, 1981, and 1982.

Walter E. & Ruth Rowan, 88 IBLA 123 (Aug. 1, 1985)

BLM may properly declare unpatented mining claims abandoned and void pursuant to 43 U.S.C. § 1744 (1982), when the claimant fails to file prior to Dec. 31 of any calendar year either evidence of annual assessment work or a notice of intent to hold.

Mine Management Corp., 88 IBLA 311 (Sept. 18, 1985)

The inference that evidence of assessment work was not timely filed with the Bureau of Land Management (BLM) arising from the absence of such a document from the case file coupled with the presumption that BLM officials have not lost legally significant documents filed with BLM may be overcome by probative evidence to the contrary.

Wells J. Horvereid, 88 IBLA 345 (Sept. 24, 1985)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM--Continued

Where the owner of a mining claim located prior to Oct. 21, 1976, fails to file either a notice of intention to hold, an affidavit of assessment work performed, or a detailed report provided by sec. 28-1 of Title 30, U.S.C., prior to Oct. 22, 1979, the claim is deemed conclusively to have been abandoned and void.

When enacting sec. 314(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), Congress intended to extinguish those claims for which timely filings were not made. Failure to file on time, in and of itself, causes the claims to be lost.

Ralph C. Memmott, 88 IBLA 363 (Sept. 27, 1985)

Under the provisions of 43 U.S.C. § 1744 (1982), an owner of an unpatented mining claim must file evidence of annual assessment work or notice of intention to hold prior to Dec. 31 of each year. Such filings must be made within each calendar year, i.e., on or after Jan. 1 and on or before Dec. 30. Failure to file within the calendar year properly results in the claim being extinguished, and therefore abandoned and void.

When enacting sec. 314(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), Congress intended to extinguish those claims for which timely filings were not made. Failure to file on time, in and of itself, causes the claims to be lost.

The Supreme Court has definitively established in United States v. Locke, 105 S. Ct. 1785 (1985), that the provisions of sec. 314 of the Federal Land Policy and Management Act of 1976, which provide that, upon the failure of a mining claimant to timely file annually either evidence of the performance of annual assessment work or a notice of intention to hold a mining claim, the claim is conclusively deemed abandoned and void, are constitutional, and do not result in a deprivation of due process of law.

Ralph C. Memmott, 88 IBLA 367 (Sept. 27, 1985)

Under the provisions of 43 U.S.C. § 1744 (1982), an owner of an unpatented mining claim must file evidence of annual assessment work or notice of intention to hold prior to Dec. 31 of each year. Such filings must be made within each calendar year, i.e., on or after Jan. 1 and on or before Dec. 30. Failure to file within the prescribed period properly results in the claim being deemed abandoned and void and, therefore, extinguished.

When enacting sec. 314(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), Congress intended to extinguish those claims for which timely filings were not made. Failure to file on time, in and of itself, causes the claims to be lost.

Ralph C. Memmott, 88 IBLA 372 (Sept. 27, 1985)

RECORDATION OF MINING CLAIMS AND ABANDONMENT

Where mining claims are located after Oct. 21, 1976, a copy of the notices of location must be filed with the proper office of the Bureau of Land Management within 90 days after the dates of such locations, failing which, the claims must be deemed conclusively to have been abandoned. If, subsequently, the locator files new notices of location bearing a later date, that constitutes a relocation of the former claims, and the new claims date from such relocation. If in

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF MINING CLAIMS AND ABANDONMENT--Continued

the interim between the abandonment of the original claims and the date of their relocation the land is withdrawn, the relocated claims are null and void ab initio.

Mac A. Stevens (On Reconsideration), 85 IBLA 33 (Jan. 31, 1985)

The failure to file the instruments required by sec. 314 of FLPMA, 43 U.S.C. § 1744 (1982), and 43 CFR 3833.1 and 3833.2 in the proper Bureau of Land Management office within the time periods prescribed therein conclusively constitutes abandonment of the mining claim by the owner.

Lanny Ray Southard, 86 IBLA 239 (Apr. 30, 1985)

Carmelita M. Holland, 87 IBLA 175 (June 13, 1985)

Failure to file instruments required by 43 U.S.C. § 1744 (1982) and 43 CFR 3833.2 in the proper BLM office within the time prescribed constitutes abandonment of the mining claim.

John R. Wellborn, Clara Joe Wellborn, 87 IBLA 20 (May 21, 1985)

James Boatman, 87 IBLA 31 (May 22, 1985)

Arla Newman, 88 IBLA 114 (July 31, 1985)

Where a mining claim was located in July 1969 and a copy of the official record of the notice of location was not filed with the proper BLM office on or before Oct. 22, 1979, the claim was properly declared abandoned and void pursuant to 43 U.S.C. § 1744(c) (1982).

John W. Finn, 87 IBLA 55 (May 23, 1985)

The failure to file the instruments required by sec. 314 of FLPMA, 43 U.S.C. § 1744 (1982), and 43 CFR 3833.1 and 3833.2, in the proper Bureau of Land Management office within the time periods prescribed therein conclusively constitutes abandonment of the mining claim by the owner.

Mt. Pinos Development Corp., 87 IBLA 102 (May 30, 1985)

The owner of an unpatented mining claim located after Oct. 21, 1976, is required to file a copy of the official record of the notice of location or certificate of location of the mining claim with the proper BLM office within 90 days after the date of location. The failure to file the required document shall be deemed conclusively to constitute an abandonment of the mining claim by the owner.

Max Lair, 87 IBLA 106 (May 30, 1985)

The failure to timely file the instruments required by sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), and 43 CFR Subpart 3833, in the proper Bureau of Land Management office conclusively constitutes abandonment of the mining claim by the owner. This Board has no authority to excuse lack of compliance with the statute or to afford relief from the statutory consequences.

Forrest G. Niccum et al., 87 IBLA 129 (June 6, 1985)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF MINING CLAIMS AND ABANDONMENT--Continued

Mining claims located prior to July 26, 1866, and recorded in accordance with the rules and customs of local mining districts were subsequently recognized as valid mining claims. Such claims, if they remain unpatented, are subject to the mining claim recordation requirement of sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982).

Under the provisions of 43 U.S.C. § 1744 (1982), an owner of an unpatented mining claim must file evidence of annual assessment work or notice of intention to hold prior to Dec. 31 of each year. Such filings must be made within each calendar year, i.e., on or after Jan. 1 and on or before Dec. 30. Failure to file within the calendar year properly results in the claim being extinguished, and therefore abandoned and void.

Failure of a lessee or agent of the owner of an unpatented mining claim to make the filings required by 43 U.S.C. § 1744 (1982) provides no basis for reversal of a decision declaring the claim abandoned and void. Congress assigned the owner of the claim the responsibility of making the required filings; the owner must bear the consequence of filings not timely made.

Comstock Tunnel & Drainage Co. & Sutro Tunnel Co., 87 IBLA 132 (June 7, 1985)

The failure to file the instruments required by sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), and 43 CFR 3833.2-1(b)(1), in the proper office of the Bureau of Land Management within the time periods prescribed therein conclusively constitutes abandonment of the mining claim by the owner.

Clara Holloway Sampson, 87 IBLA 143 (June 10, 1985)

The Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a)(2) (1982), and 43 CFR 3833.1-2 require that a mining claimant file with BLM a description of the location of the mining claim sufficient to locate the claimed lands. Where a mining claimant fails to provide such a description with the recordation of the claim, BLM may properly require the filing of such a description within a certain period of time. The failure by the mining claimant to comply with such a request may be considered grounds for declaring the claim abandoned and void in accordance with 43 CFR 3833.4; however, where the claimant provides a map, narrative, or sketch of sufficient detail to identify and locate the claims on the ground, it is improper to declare the claims abandoned and void.

Floyd & Elsie Patrin, 87 IBLA 152 (June 11, 1985)

The failure to file the instruments required by sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982) and 43 CFR Subpart 3833, in the proper Bureau of Land Management office within the time periods prescribed therein conclusively constitutes abandonment of the mining claim by the owner.

Myron Cherry, 87 IBLA 165 (June 12, 1985)

BLM may properly declare an unpatented mining claim located after Oct. 21, 1976, abandoned and void where the notice of location was not filed with BLM until after the statutory deadline for filing that document, i.e., 90 days after the date of location,

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF MINING CLAIMS AND ABANDONMENT--Continued

regardless of the fact that it was mailed on the deadline.

Allen B. Clark, 87 IBLA 204 (June 18, 1985)

BLM properly declares a mining claim abandoned and void for failure to timely file a certificate of location as required by 43 CFR 3833.1-2 even though the failure to timely file the certificate was attributed to the county's slow return of the document.

August F. Flachta, 87 IBLA 223 (June 18, 1985)

Under sec. 314(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(b) (1982), and 43 CFR 3833.1-2, the owner of an unpatented lode or placer mining claim located after Oct. 21, 1976, must file in the proper BLM office, within 90 days after the location of such claim, a copy of the official record of the notice or certificate of location. Failure to do so is deemed conclusively to constitute an abandonment of the claim by the owner. 43 U.S.C. § 1744(c) (1982).

Robert N. Van Wyck, 87 IBLA 245 (June 19, 1985)

A mining claim is properly declared void where a copy of the recorded notice of location is not filed pursuant to 43 U.S.C. § 1744(b) (1982) and 43 CFR 3833.1-2 in the proper BLM office within 90 days after the date of location.

Robert G. Young, 87 IBLA 249 (June 20, 1985)

Failure to file instruments required by 43 U.S.C. § 1744 (1982) and 43 CFR 3833.2 in the proper BLM office within the time prescribed results in a conclusive presumption of abandonment of the mining claim.

Howard Gates, 87 IBLA 261 (June 21, 1985)

Under 43 U.S.C. § 1744 (1982), the owner of an unpatented mining claim located on or before Oct. 21, 1976, was required to file with the proper office of BLM a copy of the official record of the notice or certificate of location and a copy of the evidence of assessment work on or before Oct. 22, 1979. Failure to make the required filings constitutes an abandonment of the claim by the owner.

Rights acquired under a relocation of a mining claim extinguished pursuant to 43 U.S.C. § 1744 (1982) will not relate back to the date of location of the original claim but only to the date of the relocation.

Florian L. Glineski, Mike Gilleran, 87 IBLA 266 (June 25, 1985)

Failure to file instruments required by 43 U.S.C. § 1744 (1982) and 43 CFR 3822.2 in the proper BLM office within the time period prescribed constitutes abandonment of the mining claim.

Karen M. Anderson, 87 IBLA 306 (June 25, 1985)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF MINING CLAIMS AND ABANDONMENT--Continued

Under the provisions of 43 U.S.C. § 1744 (1982), a mining claimant must file evidence of annual assessment work or a notice of intention to hold each year in a timely manner. Failure to file results in the claim being extinguished, and therefore abandoned and void.

Good Hope Development Co., 87 IBLA 341 (June 26, 1985)

BLM may properly declare an unpatented mining claim abandoned and void for failure to file timely with BLM a copy of the notice of location of the claim, pursuant to sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982).

Ellis Buschman, 87 IBLA 345 (June 26, 1985)

Under the Federal Land Policy and Management Act of 1976, 43 U.S.C § 1744 (1982), and 43 CFR 3833.1-2, the owner of an unpatented mining claim located on Federal land after Oct. 21, 1976, shall file a copy of the official record of the notice of location of the claim with the proper BLM office within 90 days after the date of location of the claim. This requirement is mandatory and failure to comply within the time period prescribed must be deemed conclusively to constitute an abandonment of the mining claim.

Mervil J. Cook, 87 IBLA 348 (June 26, 1985)

BLM may properly declare an unpatented mining claim abandoned and void where a copy of the notice of location of the claim was not received by BLM until after the deadline for filing under sec. 314(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(b) (1982), although it was purportedly mailed prior thereto.

David L. Richards, 88 IBLA 1 (July 28, 1985)

BLM may properly declare an unpatented mining claim located after Oct. 21, 1976, abandoned and void where a copy of the notice of location was not filed with BLM within 90 days after the date of location of the claim, in accordance with sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982).

H. B. Layne, Contractor, Inc., 88 IBLA 42 (July 10, 1985)

Failure to file instruments required by 43 U.S.C. § 1744 (1982) and 43 CFR 3833.2 in the proper BLM office within the time period prescribed results in a conclusive presumption of abandonment of the mining claim.

Fern L. Evans, Gary L. Carter, 88 IBLA 45 (July 10, 1985)

The owner of an unpatented mining claim located after Oct. 21, 1976, is required to file a copy of the official record of the notice of location or certificate of location of the mining claim with the proper BLM office within 90 days after the date of location. The failure to file the required document shall be deemed conclusively to constitute an abandonment of the mining claim by the owner.

Under 43 CFR 3833.1-2(a) the owner of an unpatented mining claim located after Oct. 21, 1976, must file with BLM within 90 days after the date of location

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF MINING CLAIMS AND ABANDONMENT--Continued

of the claim a copy of the official record of the notice or certificate of location of that claim that was or will be filed under state law. Where a single certificate of location for more than one claim is void under Colorado law as to all claims except the first, if properly described, the first claim of 13 claims included in a single certificate of location should be accepted by BLM for recordation under 43 CFR 3833.1-2(a).

Waldron Enterprises Mining, 88 IBLA 54 (July 16, 1985)

Failure to file an instrument required by 43 U.S.C. § 1744 (1982) within the prescribed time constitutes abandonment of the mining claim.

Michael R. Ware, 88 IBLA 111 (July 31, 1985)

The failure to file the instruments required by sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), and 43 CFR 3833.2 in the proper office of the Bureau of Land Management within the time periods prescribed therein conclusively constitutes abandonment of the mining claim by the owner.

George W. Wagner, Hazel T. Wagner, 88 IBLA 117 (July 31, 1985)

Frank A. Putnam III, 88 IBLA 314 (Sept. 18, 1985)

Failure to file instruments required by 43 U.S.C. § 1744 (1982) and 43 CFR 3833.2 in the proper BLM office within the time period prescribed results in a conclusive presumption of abandonment of the mining claim. The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced documents filed with them is rebuttable by probative evidence to the contrary. The presumption is not overcome by a statement, without corroborating evidence, that a document was mailed.

John D. O'Keefe (On Reconsideration), 88 IBLA 157 (Aug. 12, 1985)

Failure to submit recording fee either with new location or within 30 days of notice of deficiency results in rejection of the attempted recordation.

Arthur A. Gotschall, 88 IBLA 276 (Sept. 5, 1985)

With respect to disputes between rival mining claimants concerning which claimant has the superior right to possession of a claim, a court of competent jurisdiction is the proper forum.

Wells J. Horvereid, 88 IBLA 345 (Sept. 24, 1985)

When a single claim has been recorded with BLM pursuant to 43 U.S.C. § 1744 (1982) on two or more occasions and given two or more mining recordation serial numbers, the proper corrective procedure is to merge the respective files and cancel one or more of the mining claim recordation serial numbers. If, on a combined basis, all requisite filings have been made, the claim should not be conclusively deemed to be abandoned pursuant to 43 U.S.C. § 1744(c) (1982).

Ralph C. Memmott, 88 IBLA 377 (Sept. 27, 1985)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

REPEALERS

A mining claim located on lands which are withdrawn for reclamation purposes under the first form is null and void ab initio. A first-form reclamation withdrawal completed prior to Oct. 21, 1976, remains in effect, subject to review by the Secretary, notwithstanding the repeal of the statute authorizing the initiation of such withdrawals.

William B. Rawlings, 85 IBLA 243 (Mar. 4, 1985)

RESERVATION AND CONVEYANCE OF MINERAL INTERESTS

BLM may properly reject an application for conveyance of a Federally owned mineral interest (oil and gas) to the owner of the surface estate pursuant to sec. 209(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1719(b) (1982), where the applicant has not shown that use of the land for production of avocadoes is a more beneficial use of the land than mineral development.

Richard Alves, Philip G. Smith, Ruth M. Smith, 85 IBLA 397 (Mar. 29, 1985)

An application for conveyance of mineral interest to the owner of the surface estate pursuant to sec. 209(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1719(b) (1982), may be approved where BLM determines (1) that there are no known mineral values in the land, or (2) that the reservation of the mineral rights in the United States is interfering with or precluding appropriate nonmineral development of the land and that such development is a more beneficial use of the land than mineral development. Absent a finding of the existence of one of these conditions, an application is properly rejected.

Temblor Enterprises, Inc., 86 IBLA 175 (Apr. 26, 1985)

An application for conveyance of mineral interests to the owner of the surface estate pursuant to 43 U.S.C. § 1719(b) (1982), may be approved where BLM determines (1) that there are no known mineral values in the land, or (2) that the reservation of the mineral rights in the United States is interfering with or precluding appropriate nonmineral development of the land and that such development is a more beneficial use of the land than mineral development. Absent a finding or the existence of one of these conditions, an application is properly rejected.

Because the definition of "known mineral values" at 43 CFR 2730.0-5(b) includes prospective value, absence of current mineral production provides no basis for concluding that land has no known mineral values in adjudicating an application for conveyance of federally owned mineral interests pursuant to 43 U.S.C. § 1719(b) (1982).

An application for conveyance of a federally owned mineral interest is properly rejected if the applicant fails to provide, pursuant to 43 CFR 2720.1-2(d)(4), as complete a statement as possible concerning (i) the nature of federally reserved or owned mineral values in the land, including explanatory information, (ii) the existing and proposed uses of the land, (iii) why the reservation of the mineral interests in the United States is interfering with or precluding appropriate non-mineral development of the land covered by the application, (iv) how and why such development would be a more beneficial use of the land than its mineral development, and (v) a showing that the proposed use

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RESERVATION AND CONVEYANCE OF MINERAL INTERESTS--Continued

complies or will comply with State and local zoning and/or planning requirements.

Kenneth C. Pixley, 88 IBLA 300 (Sept. 13, 1985)

RIGHTS-OF-WAY

Under the Federal Land Policy and Management Act of 1976, approval of a right-of-way by the Secretary of the Interior is discretionary. A decision of the Bureau of Land Management rejecting an application for a right-of-way will ordinarily be affirmed by this Board when the record shows the decision is based on a reasoned analysis of the factors involved, made with due regard for the public interest.

High Summit Oil & Gas, Inc., 84 IBLA 359 (Jan. 24, 1985) 92 I.D. 58

In adjudicating a protest against an application for radio communications right-of-way, the Bureau of Land Management is required by 43 CFR 4.450-2 only to consider and decide matters which are proposed to be done. Where an application for right-of-way has already matured into a functioning use, a protest against the proposal upon which the use was initiated must be dismissed.

Willamette Logging Communications, Inc., Springfield Radio Communications, Inc., 86 IBLA 77 (Apr. 10, 1985)

A Bureau of Land Management decision rejecting a right-of-way application for a road filed pursuant to sec. 501(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761(a) (1982), will be affirmed when the record shows the decision to be a reasoned analysis of the factors involved, made with due regard for the public interest.

Dwane Thompson, 88 IBLA 31 (July 9, 1985)

SALES

Where in 1964 a tract of public land was offered for public sale pursuant to 43 U.S.C. § 1171 and the adjacent landowners were declared the purchasers, but the sale was subsequently vacated and all money reimbursed by a decision which afforded them the right of appeal, and where no appeal was taken and 43 U.S.C. § 1171 was thereafter repealed, the decision became final and no residual rights under that sale or the repealed statute survived. Therefore, a protest by these same landowners against the re-offering of this tract for sale pursuant to 43 U.S.C. § 1713, based on their asserted priority at the 1964 sale, is properly dismissed.

George Henke, Beatrice Henke, 87 IBLA 81 (May 29, 1985)

SERVICE CHARGES

Failure to submit recording fee either with new location or within 30 days of notice of deficiency results in rejection of the attempted recordation.

Arthur A. Gotschall, 88 IBLA 276 (Sept. 5, 1985)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

SURFACE MANAGEMENT

Under the regulations adopted by the Bureau of Land Management, the authorized officer has no authority to approve or disapprove the contents of a notice of intent to commence mining operations filed under 43 CFR 3809.1-3(a). Therefore, where an operator has failed to timely file pursuant to that section, a notice of noncompliance may be issued, but such notice is necessarily limited in scope to requiring the operator to submit a notice.

Pursuant to 43 CFR 3809.3-2(d), a notice of noncompliance properly issues upon a determination that a use to which a mining claim may properly be put is occurring in such a manner as to result in unnecessary or undue degradation of the land.

While mining claimants are required to obtain all necessary state permits relating to mining activities, a notice of noncompliance based on the failure to obtain such permits can only be sustained where the authorized officer delineates exactly which permits were required and provides sufficient factual background to support this conclusion.

Bruce W. Crawford et ux., 86 IBLA 350 (May 17, 1985)
92 I.D. 208

WILDERNESS

Where the record evidences BLM's firsthand knowledge of the lands within an inventory unit and contains comments from the public as to the area's fitness for wilderness preservation, BLM's subjective judgments of the unit's naturalness qualities and whether an inventory unit possesses outstanding opportunities for solitude or a primitive and unconfined type of recreation are entitled to considerable deference.

In assessing the presence or absence of wilderness characteristics in an inventory unit, BLM necessarily makes subjective judgments which are entitled to considerable deference when challenged on appeal and such judgments may not be overcome simply by expressions of disagreement.

A BLM decision to eliminate an inventory unit from further consideration as a wilderness study area, pursuant to sec. 603(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1782(a) (1982), will be set aside and the case remanded to BLM where, on appeal, the appellant raises substantial questions concerning the adequacy of BLM's consideration of whether the unit has the requisite naturalness or outstanding opportunities for solitude or a primitive and unconfined type of recreation, and the record does not adequately support BLM's conclusions on these matters.

Committee for Idaho's High Desert, 85 IBLA 54 (Feb. 11, 1985)

Evaluations made by BLM personnel in the wilderness inventory process are necessarily subjective and judgmental. The conclusions reached must be accorded considerable deference notwithstanding the result might be one over which reasonable men could differ. An appellant seeking reversal must ordinarily show either a clear error of law or a demonstrable error of fact.

Committee for Idaho's High Desert, The Wilderness Society, 85 IBLA 112 (Feb. 14, 1985)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

WILDERNESS--Continued

In assessing the presence or absence of wilderness characteristics in an inventory unit, BLM necessarily makes subjective judgments which are entitled to considerable deference when challenged on appeal and such judgments may not be overcome simply by expressions of disagreements.

A BLM decision based on reassessment of the wilderness characteristics of a unit will be reversed where it is established that BLM failed properly to reassess the unit, and it is also established that such failure caused BLM to reach an incorrect conclusion.

Utah Wilderness Ass'n et al., Clive Kincaid, 86 IBLA 89 (Apr. 12, 1985)

FEES

Failure to submit recording fee either with new location or within 30 days of notice of deficiency results in rejection of the attempted recordation.

Arthur A. Gotschall, 88 IBLA 276 (Sept. 5, 1985)

GEOTHERMAL LEASES

CANCELLATION

A decision denying a protest of the contemplated issuance of noncompetitive geothermal resources leases will not be effective during the period of time in which the protestant adversely affected by the decision may file a notice of appeal, and leases issued during this time are subject to cancellation.

Sierra Club, Oregon Chapter, 87 IBLA 1 (May 17, 1985)

COMPETITIVE LEASES

Where the Board has referred a high-bid rejection dispute under a geothermal resources lease sale to the Hearings Division for an evidentiary hearing and decision by an Administrative Law Judge, the appropriate standard of proof is that appellant show by a preponderance of the evidence that BLM's action was improper.

It was error for MMS to regard costs associated with the Coso Geothermal Exploratory Hole No. 1, drilled under the auspices of the Department of Energy, as not comparable to estimated costs for the drilling of a geothermal resources exploration well in another area of the Coso Known Geothermal Resources Area, for purposes of establishing the minimum acceptable bid in a competitive sale.

It was error for MMS to estimate drilling costs for a geothermal well on the basis of costs experienced in oil and gas drilling. The two types of exploration are so dissimilar that meaningful cost comparisons cannot be made.

California Energy Co. (On Reconsideration), 85 IBLA 254 (Mar. 6, 1985)
92 I.D. 125

CONSENT OF AGENCY

BLM has the authority to decide whether to issue a noncompetitive geothermal resources lease pursuant to sec. 3 of the Geothermal Steam Act of 1970, 30 U.S.C. § 1002 (1982), for land within a national forest where the Forest Service has consented to leasing, and to impose additional stipulations, in order to protect

GEOTHERMAL LEASES--Continued

CONSENT OF AGENCY--Continued

environmental resources, not inconsistent with those prescribed by the Forest Service. Where BLM has expressly not exercised that authority, the case will be remanded for that purpose, including a consideration of whether BLM has properly provided for staged leasing, i.e., leasing subject to subsequent approval of specific development activities contingent on a finding that no environmentally unacceptable impact will occur.

Sierra Club, Oregon Chapter, 87 IBLA 1 (May 17, 1985)

DISCRETION TO LEASE

Where the Board has referred a high-bid rejection dispute under a geothermal resources lease sale to the Hearings Division for an evidentiary hearing and decision by an Administrative Law Judge, the appropriate standard of proof is that appellant show by a preponderance of the evidence that BLM's action was improper.

It was error for MMS to regard costs associated with the Coso Geothermal Exploratory Hole No. 1, drilled under the auspices of the Department of Energy, as not comparable to estimated costs for the drilling of a geothermal resources exploration well in another area of the Coso Known Geothermal Resources Area, for purposes of establishing the minimum acceptable bid in a competitive sale.

It was error for MMS to estimate drilling costs for a geothermal well on the basis of costs experienced in oil and gas drilling. The two types of exploration are so dissimilar that meaningful cost comparisons cannot be made.

California Energy Co. (On Reconsideration), 85 IBLA 254 (Mar. 6, 1985) 92 I.D. 125

ENVIRONMENTAL PROTECTION

Generally

BLM has the authority to decide whether to issue a noncompetitive geothermal resources lease pursuant to sec. 3 of the Geothermal Steam Act of 1970, 30 U.S.C. § 1002 (1982), for land within a national forest where the Forest Service has consented to leasing, and to impose additional stipulations, in order to protect environmental resources, not inconsistent with those prescribed by the Forest Service. Where BLM has expressly not exercised that authority, the case will be remanded for that purpose, including a consideration of whether BLM has properly provided for staged leasing, i.e., leasing subject to subsequent approval of specific development activities contingent on a finding that no environmentally unacceptable impact will occur.

Sierra Club, Oregon Chapter, 87 IBLA 1 (May 17, 1985)

LEASES AND PERMITS

Generally

A decision denying a protest of the contemplated issuance of noncompetitive geothermal resources leases will not be effective during the period of time in which the protestant adversely affected by the decision may file a notice of appeal, and leases issued during this time are subject to cancellation.

Sierra Club, Oregon Chapter, 87 IBLA 1 (May 17, 1985)

GEOTHERMAL LEASES--Continued

NONCOMPETITIVE LEASES

BLM has the authority to decide whether to issue a noncompetitive geothermal resources lease pursuant to sec. 3 of the Geothermal Steam Act of 1970, 30 U.S.C. § 1002 (1982), for land within a national forest where the Forest Service has consented to leasing, and to impose additional stipulations, in order to protect environmental resources, not inconsistent with those prescribed by the Forest Service. Where BLM has expressly not exercised that authority, the case will be remanded for that purpose, including a consideration of whether BLM has properly provided for staged leasing, i.e., leasing subject to subsequent approval of specific development activities contingent on a finding that no environmentally unacceptable impact will occur.

Sierra Club, Oregon Chapter, 87 IBLA 1 (May 17, 1985)

GRAZING PERMITS AND LICENSES

CANCELLATION OR REDUCTION

In order to prove livestock trespass upon public lands alleged to have occurred when excessive numbers of cattle were grazed upon allotments of public land permitted for lesser numbers, some actual trespass must be shown to have taken place before the "access trespass presumption" can be applied to calculate damages.

Bureau of Land Management v. David & Bonnie Ericsson, 88 IBLA 248 (Sept. 4, 1985)

HEARINGS

A hearing is not necessary in the absence of a material issue of fact, which, if proven, would alter the disposition of the matter. A hearing is not necessary where the dispute does not involve facts, but involves the proper application and interpretation of those facts, and the Bureau of Land Management properly reviewed the same information submitted to this Board.

Woods Petroleum Co., 86 IBLA 46 (Apr. 10, 1985)

Pursuant to 43 CFR 2650.4-7(a)(3), an easement for public access may not be reserved across Native lands where there exists a reasonable alternative route of transportation across publicly owned lands. Where the reasonableness of an alternative route decided upon by BLM is challenged on appeal and the facts of record are insufficient to determine whether BLM's decision should be affirmed, this Board has the discretionary authority to order a hearing in the matter before an Administrative Law Judge, pursuant to 43 CFR 4.415.

State of Alaska, 86 IBLA 263 (May 10, 1985)

HOMESTEADS (ORDINARY)

CONTESTS

Neither actual nor constructive notice of a Departmental decision is accomplished by an attempted service using certified mail where the delivering post office returns the decision to the Department after 7 days and it affirmatively appears that the addressee had not moved nor refused delivery, and the address used was his address of record.

While 43 U.S.C. § 1165 (1982) provides for issuance of a patent to an entryman upon a 2-year lapse following issuance of "receipt" when no contest is then

HOMESTEADS (ORDINARY)--Continued

CONTESTS--Continued

pending, the statutory 2-year period does not begin to run at the time the entryman files his final proof, but begins only upon payment for the land. Where appellant had not paid for the land sought to be patented, but had only paid fees associated with filing his homestead entry, he was not entitled to patent.

Terry L. Wilson, 85 IBLA 206 (Feb. 28, 1985)
92 I.D. 109

INDIAN PROBATE

ADMINISTRATIVE LAW JUDGE

Because Administrative Law Judges (Indian Probate) are required to carry out the Federal trust responsibility to Indian tribes and individual Indians in Indian probate proceedings, they must both serve as impartial arbiters and ensure that the trustee's responsibilities to Indian parties are fulfilled.

Estate of Charles Webster Hills, 13 IBIA 188 (July 17, 1985)
92 I.D. 304

ADOPTION (See also CHILDREN, ADOPTED--if included in this Index.)

Generally

The adoption decree at issue in this Indian probate proceeding is invalid because it was rendered by a state court lacking jurisdiction.

Estate of James Wemy Pekah, 13 IBIA 264 (Sept. 26, 1985)

APPEAL (See also PLEADING, RECONSIDERATION--if included in this Index.)

Generally

The burden of proving that the initial decision in the probate of a deceased Indian's trust estate was erroneous is on the person challenging the decision.

Estate of Paul Wilford Hail, 13 IBIA 140 (Mar. 28, 1985)

The burden of proving that the initial decision in the probate of a deceased Indian's trust estate was incorrect is on the person challenging the decision.

Estate of Eastman John Kipp, 13 IBIA 242 (Aug. 29, 1985)

The Board of Indian Appeals will show deference to an Administrative Law Judge's determination of the credibility of evidence and testimony.

Estate of Albin (Alvin) Shemamy, 13 IBIA 258 (Sept. 26, 1985)

INDIAN PROBATE--Continued

CLAIM AGAINST ESTATE (See also DIVORCE, LIEN, if included in this Index.)

Generally

Where all relevant facts have arisen within a single jurisdiction, the law of that jurisdiction determines whether alimony or support payments required by a divorce or separate maintenance decree will survive the payor's death.

Estate of Douglas Leonard Ducheneaux, 13 IBIA 169 (May 31, 1985)
92 I.D. 247

Proof of Claim

When an otherwise valid claim against an Indian trust estate is challenged on the sole grounds that payments may have been made on the claim, the claim should be approved, and the Administrative Law Judge (Indian Probate) should retain jurisdiction over the matter and require additional proof as to whether any payments have been made.

Estate of Frank Doyeto, 13 IBIA 237 (Aug. 23, 1985)

DIVORCE (See also CLAIM AGAINST ESTATE--if included in this Index.)

State Court Decree

Alimony

Where all relevant facts have arisen within a single jurisdiction, the law of that jurisdiction determines whether alimony or support payments required by a divorce or separate maintenance decree will survive the payor's death.

Estate of Douglas Leonard Ducheneaux, 13 IBIA 169 (May 31, 1985)
92 I.D. 247

EVIDENCE

Generally

The burden of proving the error of an initial Departmental Indian probate decision is on the party challenging the decision.

Estate of John Walter Few Tails, 13 IBIA 127 (Feb. 28, 1985)

Insufficiency of

The burden of proving that the initial decision in the probate of a deceased Indian's trust estate was incorrect is on the person challenging the decision.

Estate of Eastman John Kipp, 13 IBIA 242 (Aug. 29, 1985)

Weight of Evidence

In establishing paternity in an Indian probate proceeding when testimony is conflicting, contemporaneous documents should be given great weight in determining the facts they are intended to memorialize unless there is persuasive evidence that the documents were falsified or are erroneous.

Estate of Willard Guy, 13 IBIA 252 (Sept. 23, 1985)

INDIAN PROBATE--Continued

INVENTORY (See also MODIFICATION OF INVENTORY--if included in this Index.)

Property Erroneously Excluded or Included

Departmental regulations found in 43 CFR Part 4, Subpart D, suffice to allow consideration of alleged legal errors in BIA's inventory of Indian trust assets during the probate of a deceased Indian's estate.

Estate of Douglas Leonard Ducheneaux, 13 IBIA 169 (May 31, 1985) 92 I.D. 247

MARRIAGE

Generally

The Board of Indian Appeals follows the rule that the marital status of an individual is determined by the laws of the jurisdiction in which the relationship was created.

Estate of Henry Frank Racine, 13 IBIA 69 (Jan. 7, 1985)

Common Law

In order to establish a common-law marriage in the State of Montana, there must be mutual consent for parties to be presently married.

Estate of Henry Frank Racine, 13 IBIA 69 (Jan. 7, 1985)

REOPENING

Generally

When reopening of a closed Indian estate is sought for the sole purpose of determining the appellant's nationality or Indian status, and no alteration in the distribution of the decedent's estate is sought, reopening will be allowed under 43 CFR 4.206 without regard to the restrictions set forth in 43 CFR 4.242 and in previous decisions of the Board of Indian Appeals interpreting that regulation.

In Re Status of Gladys Rose Charles Whims, Thelma Charles Dick, August Charles, & Joseph Charles, 13 IBIA 94 (Feb. 12, 1985)

Failure to raise arguments at a hearing or in a petition for rehearing does not confer any right to seek reopening to raise those arguments, in disregard of the regulatory proscription set forth in 43 CFR 4.242(h).

Estate of Albin (Alvin) Shemamy, 13 IBIA 258 (Sept. 26, 1985)

Standing to Petition for Reopening

An adult who participated in the original probate hearing into a deceased Indian's estate normally lacks standing to petition for reopening.

Estate of Albin (Alvin) Shemamy, 13 IBIA 258 (Sept. 26, 1985)

INDIAN PROBATE--Continued

RESULTING TRUST

Resulting purchase money trusts in Indian trust land may not be claimed by persons to whom the Federal Government owes no trust responsibility.

Estate of Douglas Leonard Ducheneaux, 13 IBIA 169 (May 31, 1985) 92 I.D. 247

SETTLEMENT (See also FAMILY ALLOWANCE AND SETTLEMENT--if included in this Index.)

Under the facts of this case, the Board of Indian Appeals will accept the appellant's statement that she does not wish to share in the decedent's estate as a compromise settlement under 43 CFR 4.207.

Estate of Willard Guy, 13 IBIA 252 (Sept. 23, 1985)

STATE LAW

Generally

Where all relevant facts have arisen within a single jurisdiction, the law of that jurisdiction determines whether alimony or support payments required by a divorce or separate maintenance decree will survive the payor's death.

Estate of Douglas Leonard Ducheneaux, 13 IBIA 169 (May 31, 1985) 92 I.D. 247

WILLS (See also CONTRACT TO MAKE WILL, INHERITING--if included in this Index.)

Construction of

The principal criterion guiding an Administrative Law Judge in construing an Indian will is always the intention of the testator, if that intention can be reasonably ascertained and it is not contrary to an established rule of law or in violation of public policy.

Estate of Paul Wilford Hail, 13 IBIA 140 (Mar. 28, 1985)

Failure to Mention Child

The failure of an Indian testator to provide for a spouse, children, or other heirs in a will does not invalidate the will.

Estate of Eastman John Kipp, 13 IBIA 242 (Aug. 29, 1985)

Failure to Mention Spouse

The failure of an Indian testator to provide for a spouse, children, or other heirs in a will does not invalidate the will.

Estate of Eastman John Kipp, 13 IBIA 242 (Aug. 29, 1985)

INDIAN PROBATE--Continued

WILLS (See also CONTRACT TO MAKE WILL, INHERITING--if included in this Index.)--Continued

State Law

Applicability to Indian Probate

The authority of the Secretary of the Interior to approve an indian will is controlled by 25 U.S.C. § 373 (1982) and regulations published in 43 CFR 4.260.262, not by state law.

Estate of Paul Wilford Hail, 13 IBIA 140 (Mar. 28, 1985)

Testamentary Capacity

Generally

The burden of proof as to testamentary incapacity or undue influence in Indian probate proceedings is on those contesting the will.

Estate of Thomas Longtail, Jr., 13 IBIA 136 (Mar. 27, 1985)

Undue Influence

The burden of proof as to testamentary incapacity or undue influence in Indian probate proceedings is on those contesting the will.

To invalidate an Indian will because of undue influence upon a testator, it must be shown: (1) That he was susceptible of being dominated by another; (2) that the person allegedly influencing him in the execution of the will was capable of controlling his mind and actions; (3) that such person did exert influence upon the decedent of a nature calculated to induce or coerce him to make a will contrary to his own desires; and (4) that the will is contrary to the decedent's own desires.

Estate of Thomas Longtail, Jr., 13 IBIA 136 (Mar. 27, 1985)

When the evidence shows that the principal beneficiary under an Indian will and the testator were in a special confidential relationship, particularly one involving financial matters, a rebuttable presumption of undue influence is raised, and the burden of rebutting that presumption is borne by the proponent of the will.

Estate of Charles Webster Hills, 13 IBIA 188 (July 17, 1985) 92 I.D. 304

WITNESSES

Observation by Administrative Law Judge

Where evidence is conflicting, the Board of Indian Appeals normally will not disturb a decision based upon findings of credibility when the Administrative Law Judge had an opportunity to hear the witnesses and to observe their demeanor.

Estate of John Walter Few Tails, 13 IBIA 127 (Feb. 28, 1985)

INDIANS

ALASKA NATIVES

Generally

Sec. 17(b) of the Alaska Native Claims Settlement Act requires the Secretary, when approving a selection of lands by a Native corporation, to reserve such easements as are reasonably necessary to guarantee a full right of public access across selected lands to public lands not embraced in the selection.

State of Alaska, 86 IBLA 263 (May 10, 1985)

A determination by the Bureau of Indian Affairs to issue a certificate of ineligibility to a Native corporation claiming status as a Native group under sec. 14(h)(2) of the Alaska Native Claims Settlement Act of 1971, 43 U.S.C. § 1613(h)(2) (1982) because the members of the corporation do not compose more than one family or household as required by 43 CFR 2653.6(a)(5) will be affirmed on appeal where the facts show that on the critical census date the four Native members were grandparents and two adult grandchildren, and that the living situation at the group locality was that of a single family or household with the grandfather as head of that family or household.

Deacon's Landing, Inc., 86 IBLA 340 (May 16, 1985)

A Native allotment applicant is required to make satisfactory proof of substantially continuous use and occupancy of land claimed for a minimum period of 5 years. Such use and occupancy contemplates substantial actual possession or use of the land at least potentially exclusive of others. Where the evidence in the record does not establish applicant's potentially exclusive use of an allotment, and a Native corporation denies the appellant's claims to the lands sought, the Bureau of Land Management shall institute contest proceedings so that evidence as to applicant's entitlement to the allotment may be presented.

Pedro Bay Corp., 88 IBLA 349 (Sept. 24, 1985)

CITIZENSHIP/NATIONALITY

When reopening of a closed Indian estate is sought for the sole purpose of determining the appellant's nationality or Indian status, and no alteration in the distribution of the decedent's estate is sought, reopening will be allowed under 43 CFR 4.206 without regard to the restrictions set forth in 43 CFR 4.242 and in previous decisions of the Board of Indian Appeals interpreting that regulation.

In Re Status of Gladys Rose Charles Whims, Thelma Charles Dick, August Charles, & Joseph Charles, 13 IBIA 94 (Feb. 12, 1985)

ECONOMIC ENTERPRISES

Buy Indian Act

The meaning of "100 percent Indian control" of a business as used under the Buy Indian Act, 25 U.S.C. § 47 (1982), includes not only apparent control, but also actual control as evidenced by some measure of active participation in the business that would tend to increase Indian self-sufficiency.

Native American Management Services, Inc. v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 13 IBIA 99 (Feb. 19, 1985) 92 I.D. 99

INDIANS--Continued

FEDERAL RECOGNITION OF INDIAN TRIBES

Recognition

Federal recognition of Indian tribes is governed by 25 CFR Part 83, which places such recognition within the purview of the Assistant Secretary for Indian Affairs, subject to review by the Secretary. Therefore, the Board of Indian Appeals does not have authority to review cases involving recognition of Indian tribes.

Interim Ad Hoc Committee of the Karok Tribe v. Area Director, Sacramento Area Office, Bureau of Indian Affairs, 13 IBIA 76 (Jan. 8, 1985) 92 I.D. 46

FINANCIAL MATTERS

Individual Indian Money Accounts

Disbursements from a minor's Individual Indian Money account may be made in accordance with a plan, approved by the Secretary, showing that the funds will be expended in accordance with the best interests of the minor.

Yolanda Chornicle Rogers v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 13 IBIA 247 (Sept. 13, 1985)

LANDS

Allotments on Public Domain

Generally

Where the Forest Service, U.S. Department of Agriculture, determines that national forest lands applied for as an Indian allotment under 25 U.S.C. § 337 (1982) are more valuable for the timber found thereon than for agricultural or grazing purposes and accordingly rejects the allotment, the allotment applicant has no right of appeal to the Interior Board of Land Appeals but rather must appeal such a determination within the Department of Agriculture.

James R. Hensher et al., 85 IBLA 343 (Mar. 22, 1985) 92 I.D. 140

Classification

Where the Forest Service, U.S. Department of Agriculture, determines that national forest lands applied for as an Indian allotment under 25 U.S.C. § 337 (1982) are more valuable for the timber found thereon than for agricultural or grazing purposes and accordingly rejects the allotment, the allotment applicant has no right of appeal to the Interior Board of Land Appeals but rather must appeal such a determination within the Department of Agriculture.

James R. Hensher et al., 85 IBLA 343 (Mar. 22, 1985) 92 I.D. 140

LAW AND ORDER

Civil Jurisdiction

The general civil and criminal judicial authority of the Muscogee (Creek) Nation was abolished by act of Congress, and was not restored by the Oklahoma Indian Welfare Act of 1936.

Muscogee (Creek) Nation v. Acting Area Director, Muskogee Area Office, Bureau of Indian Affairs, 13 IBIA 211 (July 22, 1985) 92 I.D. 309

INDIANS--Continued

LAW AND ORDER--Continued

Civil Jurisdiction--Continued

The adoption decree at issue in this Indian probate proceeding is invalid because it was rendered by a state court lacking jurisdiction.

Estate of James Wersy Pekah, 13 IBIA 264 (Sept. 26, 1985)

Criminal Jurisdiction

The general civil and criminal judicial authority of the Muscogee (Creek) Nation was abolished by act of Congress, and was not restored by the Oklahoma Indian Welfare Act of 1936.

Muscogee (Creek) Nation v. Acting Area Director, Muskogee Area Office, Bureau of Indian Affairs, 13 IBIA 211 (July 22, 1985) 92 I.D. 309

LEASES AND PERMITS

Generally

The construction of a contract approved by the Bureau of Indian Affairs on behalf of an Indian or Indian tribe is a question of Federal law. In the absence of Federal cases on point, state law may be used as an indication of the general common law.

Jack Dean Franks v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 13 IBIA 231 (Aug. 23, 1985)

Arbitration

A lessee of Indian lands does not have a right to invoke the lease's arbitration clause after the lease has been canceled.

Jack Dean Franks v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 13 IBIA 231 (Aug. 23, 1985)

Cancellation or Revocation

In order for an automatic termination lease provision to be upheld, it must clearly indicate that automatic termination is intended, the circumstances bringing about automatic termination, and the consequences of the termination.

Cancellation of an Indian lease is effective when issued, unless, as in this case, the lease specifically provides for a different effective date.

Pyramid Lake Paiute Tribe of Indians v. Deputy Ass't Secretary--Indian Affairs (Operations), 13 IBIA 162 (May 29, 1985)

A lessee of Indian lands does not have a right to invoke the lease's arbitration clause after the lease has been canceled.

The Bureau of Indian Affairs is not required to give the lessee of Indian trust land a reasonable time in which to cure a breach of the lease when it is

INDIANS--Continued

LEASES AND PERMITS--Continued

Cancellation or Revocation--Continued

determined in accordance with 25 CFR 162.14 that the breach cannot be cured.

Jack Dean Franks v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 13 IBIA 231 (Aug. 23, 1985)

Violation/Breach

Waiver of Breach

Whether the acceptance of rent by an Indian lessor after a default in specific provisions of a lease constitutes a waiver of the default is a question of the lessor's intent, which is determined on the basis of the facts of the particular case.

Jack Dean Franks v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 13 IBIA 231 (Aug. 23, 1985)

MINERAL RESOURCES

Oil and Gas

Generally

BLM may properly rely on public hearings conducted, and adopt past and future decisions rendered by a State board with respect to oil and gas conservation within Indian lands where BLM retains the ultimate jurisdiction to approve such decisions and, in fact, exercises an independent review function prior to such adoption.

Assiniboine & Sioux Tribes, 85 IBLA 39 (Feb. 5, 1985)

TRUST RESPONSIBILITY

In order to fulfill its trust responsibility, the Bureau of Indian Affairs must carry out actions undertaken on behalf of Indian beneficiaries in a way that is not contrary to their best interests.

Patricia Ann Schoolcraft Patencio v. Area Director, Sacramento Area Office, Bureau of Indian Affairs, 13 IBIA 150 (May 21, 1985)

INTERVENTION

A mining claimant may be allowed to file a brief in the appeal of a conflicting claimant.

George R. Schultz et al., 85 IBLA 77 (Feb. 14, 1985)
92 I.D. 83

LACHES

The United States is not barred by the equitable defenses of estoppel and laches from enforcing public land laws. Moreover, BLM owes no duty to mining claimants to promptly ascertain the legal status of every claim filed and inform such claimants of its findings.

Hugh B. Pate, Jr., et al., 86 IBLA 215 (Apr. 30, 1985)

LIEU SELECTIONS

The legislative history of the Act of July 6, 1960, clearly shows that Congress concluded that the Federal Government holds title to land relinquished to the Federal Government in anticipation of a forest lieu exchange, notwithstanding the failure to consummate the exchange.

An application for a recordable disclaimer of the Government's interest in a parcel of land in the Los Padres National Forest (formerly, Pine Mountain and Zaca Lake Forest Reserve) pursuant to sec. 315 of the Federal Land Policy and Management Act of 1976, which parcel was deeded to the Government in 1901 in contemplation of selecting another parcel in lieu thereof pursuant to the Act of June 4, 1897, is properly rejected even though the lieu selection was never consummated, because the Act of July 6, 1960, quieted title to such land in the United States as part of the national forest in which the lands are located.

Frederick Siemon, 86 IBLA 149 (Apr. 25, 1985)

MILLSITES

GENERALLY

A millsite claim located on land which has been segregated from mineral location is properly declared null and void ab initio.

Clara Holloway Sampson, 87 IBLA 143 (June 10, 1985)

MINERAL LANDS

GENERALLY

Where the subsurface mineral estate is severed from the surface estate, the owner of the mineral estate retains, either by the express terms of the conveyance or as a necessary implication therefrom, a right of entry or access to the minerals over or through the surface, absent an expressed intent to the contrary in the document creating the severance. Since no such contrary intent was manifested in the Alaska Native Claims Settlement Act, insofar as lands in Naval Petroleum Reserve No. 4, now NPR-A, are concerned, the Department of the Interior, as the present owner of the mineral estate, is vested with such right of entry or access independent of any contractual grant of access rights.

Kuupik Corp., 85 IBLA 366 (Mar. 26, 1985)

MINERAL LEASING ACT

GENERALLY

A sodium prospecting permittee who applies for a sodium preference right lease, alleging with supportive data that he has discovered a valuable deposit of sodium and that the land is chiefly valuable for sodium, as required by sec. 24 of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 262 (1982), is entitled to a hearing before an Administrative Law Judge, pursuant to the provisions of 43 CFR 3521.1-1(j)(2), before his lease application may be finally rejected.

Yankee Gulch Joint Venture et al., 84 IBLA 353 (Jan. 22, 1985)

MINERAL LEASING ACT--Continued

GENERALLY--Continued

Pursuant to 30 U.S.C. § 207(a) (1982) and 43 CFR Subpart 3451, the Secretary is vested with broad discretionary authority to readjust every term or condition of a coal lease. A lessee of a pre-Federal Coal Leasing Amendments Act lease has no vested rights to the indefinite continuation of existing lease terms.

Where a notice of intent to readjust a coal lease is given to a lessee prior to expiration of the period allowed for readjustment, such notice satisfies the statutory requirements, and the Bureau of Land Management may subsequently provide the specific terms or conditions for readjustment.

The Federal Coal Leasing Amendments Act, 30 U.S.C. §§ 201-209 (1982), governs the terms and conditions that the Department may impose upon readjustment of leases issued prior to the Act.

A decision by the Bureau of Land Management to readjust a coal lease will be affirmed where the readjusted provisions appealed by the lessee are mandated by statute or regulation, or where such provisions are in accordance with proper administration of the public lands.

Consolidation Coal Co., Chevron Coal Development Co., 86 IBLA 60 (Apr. 10, 1985)

The Bureau of Land Management may properly conform a competitive coal lease to set forth the specific deferred bonus bid and schedule for payment in accordance with the terms of the lease sale. By submitting its bid, the lessee has already agreed to such a deferred bonus bid payment where the term was included in the detailed statement of the lease sale and was incorporated into the contract upon acceptance of the bid and subsequent lease issuance.

Bureau of Land Management may not cancel a competitive coal lease by administrative action, but must institute an appropriate judicial proceeding under 30 U.S.C. § 188(a) (1982) where, subsequent to lease issuance, the lessee failed to pay timely an installment of the deferred bonus bid, and the annual rental as required by the lease which failure constituted cause for cancellation.

Apex Mining Co., Inc., Jerry W. Williams, 86 IBLA 242 (Apr. 30, 1985)

Previous oil and gas lease suspensions that were granted, but where the Department allowed lease activity during the period of suspension, were made in the absence of clear legal guidance to the contrary. One was based on the surname of the Solicitor. In such situations, later advice that the action taken is not in accordance with a proper interpretation of the statute should only be given prospective application. However, in the future, suspensions should only be granted or directed in a manner consistent with the law as interpreted in this memorandum.

Oil & Gas Lease Suspension, M-36953 (May 31, 1985) 92 I.D. 293

A decision by the Bureau of Land Management to readjust a coal lease will be affirmed where the readjusted provisions appealed by the lessee are mandated by statute or regulation, or where such provisions are in accordance with proper administration of the public lands.

A provision in a readjusted coal lease requiring the lessee to conduct operations so as to avoid or, where avoidance is impracticable, to minimize and, where practicable, to repair, damage to Federal forage

MINERAL LEASING ACT--Continued

GENERALLY--Continued

and timber, improvements including crops, of a surface owner, and improvements owned by the United States or by its permittees, licensees, or lessees, is appropriate and properly included in a lease readjustment.

It is proper to include a provision in a readjusted coal lease which reserves to the United States the right to authorize other uses of the leased lands that do not unreasonably interfere with the exploration and mining operations of the lessee, since any authorized use would be subject to the lease.

It is proper to include in a readjusted coal lease a provision requiring the lessee to conduct at its own expense a survey and inventory of archaeological and paleontological values prior to approval of a mining plan or any activity that would disturb the surface of the land.

Kaiser Steel Corp., 87 IBLA 228 (June 19, 1985)

BLM has the authority to issue notices of incidents of noncompliance, e.g., for failure to regravel an access road and to remove reserve pit fluids, and to levy an assessment under 43 CFR 3163.3 (1983) with respect to the operation of oil and gas wells on Federal noncompetitive oil and gas leases within a national forest.

Where BLM has issued a decision which levied an assessment for noncompliance with a previous order with respect to the operation of oil and gas wells on noncompetitive oil and gas leases and has afforded the lessee a technical and procedural review in accordance with 43 CFR 3165.3, the decision of that official is binding.

Riviera Drilling & Exploration, 87 IBLA 357 (June 27, 1985)

LANDS SUBJECT TO

Lands under a railroad right-of-way issued pursuant to the Act of Mar. 3, 1875, 18 Stat. 482, are not properly leased under the Mineral Leasing Act of 1920, 30 U.S.C. § 181 (1982), but instead must be leased under the exclusive authority of the Act of May 21, 1930, 30 U.S.C. §§ 301-306 (1982).

William L. Ahls, 85 IBLA 66 (Feb. 11, 1985)

The statutory withdrawal pursuant to the Act of Sept. 19, 1914, 38 Stat. 714, of certain lands from location, entry, or appropriation under the public land and mineral laws does not constitute a per se withdrawal from mineral leasing. Leases issued pursuant to the subsequently enacted Mineral Leasing Act of 1920, 30 U.S.C. §§ 181-287 (1982), are generally not considered to constitute a location, entry, or appropriation of the public lands embraced therein as these terms refer to acts by which a claim of title to the land is initiated.

Douglas H. Willson, W. G. Boonenberg, 86 IBLA 135 (Apr. 22, 1985) 92 I.D. 153

MINERAL LEASING ACT FOR ACQUIRED LANDS

CONSENT OF AGENCY

The Mineral Leasing Act for Acquired Lands, as amended, 30 U.S.C. § 351 (1982), requires that the consent of the administrative agency having jurisdiction over acquired land described in a lease offer be obtained prior to the issuance of a lease for such land. Where the Corps of Engineers does not consent to lease because its research testing could be affected by a drilling operation, the Department of the Interior is without authority to lease.

Sam P. Jones (On Judicial Remand), 84 IBLA 331 (Jan. 11, 1985)

Under the Mineral Leasing Act for Acquired Lands of 1947, as amended, 30 U.S.C. §§ 351-359 (1982), if the lands embraced within an oil and gas lease application are under surface jurisdiction of a service or bureau within the Department of the Interior, such as the Bureau of Reclamation, the consent of the Secretary of the Interior is necessary under the Act for leasing of the land.

Robert J. Shorney, 88 IBLA 61 (July 22, 1985)

The Mineral Leasing Act for Acquired Lands of 1947, as amended, 30 U.S.C. §§ 351-359 (1982), requires that the consent of the administrative agency having jurisdiction over acquired land described in a lease application be obtained prior to the issuance of a lease for such land. Absent consent, the Department of the Interior is without authority to issue a lease.

Beard Oil Co., 88 IBLA 268 (Sept. 4, 1985)

LANDS SUBJECT TO

Where an offer to lease oil and gas on acquired lands describes land, part of which is within an incorporated city and part of which is outside the city, the Mineral Leasing Act for Acquired Lands, as amended, 30 U.S.C. § 351 (1982), precludes leasing of those lands within the city.

Sam P. Jones (On Judicial Remand), 84 IBLA 331 (Jan. 11, 1985)

While the general Departmental policy is not to suspend oil and gas lease offers to await possible future leasing of lands, the policy is not without exception. Where circumstances warrant suspension and suspension is not precluded by 43 CFR 2091.1, oil and gas lease offers for acquired lands in the Nueces River Project under the jurisdiction of the Bureau of Reclamation may be suspended until the Bureau of Reclamation has completed its oil and gas management plan for that area.

Dinero Oil Corp., 84 IBLA 394 (Jan. 28, 1985)

BLM may properly reject an acquired lands noncompetitive oil and gas lease offer filed for public domain lands.

Sam O. McReynolds, 85 IBLA 36 (Jan. 31, 1985)

MINERAL LEASING ACT FOR ACQUIRED LANDS--Continued

LANDS SUBJECT TO--Continued

BLM may not award priority as of the date of filing an amended over-the-counter noncompetitive oil and gas lease offer for acquired lands where the original lease offer was defective only to the extent of having included some land within an incorporated city, town, or village, which was unavailable for leasing under 30 U.S.C. § 352 (1982) and which was excluded from the amended offer.

Kenneth W. Mitchell, 88 IBLA 163 (Aug. 16, 1985)

MINING CLAIMS

GENERALLY

Where a lode mining claim is located partially on patented or withdrawn land, such a claim is not null and void ab initio to the extent of its inclusion of such lands. While the claim may not afford the claimant any rights whatever in the lands into which the claim is partially projected, the configuration of such a claim might, in the proper circumstances, invest the claimant with extralateral rights in other land beyond or adjacent to that land which is closed to mineral entry.

Silver Buckle Mines, Inc., 84 IBLA 306 (Jan. 7, 1985)

A mining claimant may be allowed to file a brief in the appeal of a conflicting claimant.

George R. Schultz et al., 85 IBLA 77 (Feb. 14, 1985)
92 I.D. 83

The "marketability test," a refinement of the "prudent man test," requires a claimant to show that a mineral can be extracted, removed, and marketed at a profit. The latter does not set forth a distinct standard, but rather is regarded as complementary to the "prudent man test." Factors such as the cost of extraction, removal, and marketing are relevant considerations to determine whether a person of ordinary prudence would be justified in the further expenditure of time and means to develop a paying mine.

Where a mining claimant appeals from an Administrative Law Judge's decision holding his claims invalid and makes vague assertions that prejudicial evidence was admitted at the hearing; that his expert witness was not permitted to testify that the claims could be mined profitably; and that the transcript was inadequate and incorrect, but offers no evidence to substantiate the assertions, such assertions will not serve as a basis for setting aside the Judge's decision.

United States v. Clyde L. Weekley, 86 IBLA 1 (Mar. 29, 1985)

Where the locator of a mining claim has discovered a valuable mineral deposit within the limits of his claim, the locator is granted, pursuant to 30 U.S.C. § 26 (1982), the exclusive right of possession of the surface of the claim subject to the limitations of sec. 4(b) of the Surface Resources Act, 30 U.S.C. § 612(b) (1982), if applicable, and subject to the further limitation that such rights are restricted, until the purchase price is paid, to uses reasonably incident to actual mining.

MINING CLAIMS--Continued

GENERALLY--Continued

Nothing in the general mining laws invests a locator with the right to initiate occupancy on a mining claim absent a showing that such occupancy is reasonably incident to mining activities.

Where ongoing mining activities are taking place, a challenge to occupancy as being not reasonably incident to mining requires that the mining claimant be given notice and an opportunity for a hearing at which he might establish that his occupancy is reasonably related to his actual mining operations, prior to issuance of an order directing that occupancy cease.

Bruce W. Crawford et ux., 86 IBLA 350 (May 17, 1985)
92 I.D. 208

Mining claims located prior to July 26, 1866, and recorded in accordance with the rules and customs of local mining districts were subsequently recognized as valid mining claims. Such claims, if they remain unpatented, are subject to the mining claim recordation requirement of sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982).

Comstock Tunnel & Drainage Co. & Sutro Tunnel Co., 87 IBLA 132 (June 7, 1985)

Mining claims located on lands closed to mineral entry are null and void from their inception as a matter of law, and no property rights are created thereby. Therefore, no contest proceeding, notice, or hearing is required preliminary to a decision holding that such claims are invalid. The fact of such claims being void does not depend upon any act or decision of an administrative official.

Walter MacEwen, Malcolm MacEwen, 87 IBLA 210 (June 18, 1985)

Where a lode mining claim is located partially on withdrawn or patented land, it is not null and void ab initio to the extent of its inclusion of such lands. A locator whose discovery is on lands open to location may extend the end lines and side lines of his claim across withdrawn or patented land to define the extralateral rights to lodes or veins which apex within the claim.

Timberline Mining Co., 87 IBLA 264 (June 24, 1985)

There is no limit to the number of claims a person may locate.

Michael H. Ware, 88 IBLA 111 (July 31, 1985)

ABANDONMENT

Where mining claims are located after Oct. 21, 1976, a copy of the notices of location must be filed with the proper office of the Bureau of Land Management within 90 days after the dates of such locations, failing which, the claims must be deemed conclusively to have been abandoned. If, subsequently, the locator files new notices of location bearing a later date, that constitutes a relocation of the former claims, and the new claims date from such relocation. If in the interim between the abandonment of the original claims and the date of their relocation the land is

MINING CLAIMS--Continued

ABANDONMENT--Continued

withdrawn, the relocated claims are null and void ab initio.

Mac A. Stevens (On Reconsideration), 85 IBLA 33 (Jan. 31, 1985)

The failure to file the instruments required by sec. 314 of FLPMA, 43 U.S.C. § 1744 (1982), and 43 CFR 3833.1 and 3833.2 in the proper Bureau of Land Management office within the time periods prescribed therein conclusively constitutes abandonment of the mining claim by the owner.

Lanny Ray Southard, 86 IBLA 239 (Apr. 30, 1985)

Where a mining claimant apparently inadvertently omits the serial number of two claims from the affidavit of annual labor and there is no other means of identifying the claims on the document, BLM properly declares the claims abandoned and void for failure to comply with 43 CFR 3833.2.

Arley R. Taylor, 86 IBLA 283 (May 13, 1985)

Failure to file instruments required by 43 U.S.C. § 1744 (1982) and 43 CFR 3833.2 in the proper BLM office within the time prescribed constitutes abandonment of the mining claim.

John R. Wellborn, Clara Joe Wellborn, 87 IBLA 20 (May 21, 1985)

James Boatman, 87 IBLA 31 (May 22, 1985)

Arla Newman, 88 IBLA 114 (July 31, 1985)

Neal R. Foster et al., 88 IBLA 296 (Sept. 13, 1985)

Under the provisions of 43 U.S.C. § 1744 (1982), an owner of an unpatented mining claim must file evidence of annual assessment work or notice of intention to hold prior to Dec. 31 of each year. Such filings must be made within each calendar year, i.e., on or after Jan. 1 and on or before Dec. 30. Failure to file within the calendar year properly results in the claim being extinguished, and therefore abandoned and void.

Charles H. Hagerty, 87 IBLA 23 (May 21, 1985)

Failure to file evidence of annual assessment work in calendar year 1981 for a mining claim located before Oct. 21, 1976, as required by sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), and 43 CFR 3833.2-1(a) (1981), constitutes abandonment of the claim and renders it void. Personal delivery of such evidence after regular business hours on Dec. 30, 1981, does not constitute compliance with the recordation requirement where the document is deemed by 43 CFR 1821.2-2(d) to have been filed on the next business day, Dec. 31.

United States v. Richard B. Pallas, 87 IBLA 88 (May 30, 1985)

MINING CLAIMS--Continued

ABANDONMENT--Continued

The failure to file the instruments required by sec. 314 of FLPMA, 43 U.S.C. § 1744 (1982), and 43 CFR 3833.1 and 3833.2, in the proper Bureau of Land Management office within the time periods prescribed therein conclusively constitutes abandonment of the mining claim by the owner.

Mt. Pinos Development Corp., 87 IBLA 102 (May 30, 1985)

The failure to timely file the instruments required by sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), and 43 CFR Subpart 3833, in the proper Bureau of Land Management office conclusively constitutes abandonment of the mining claim by the owner. This Board has no authority to excuse lack of compliance with the statute or to afford relief from the statutory consequences.

Forrest G. Niccum et al., 87 IBLA 129 (June 6, 1985)

Under the provisions of 43 U.S.C. § 1744 (1982), an owner of an unpatented mining claim must file evidence of annual assessment work or notice of intention to hold prior to Dec. 31 of each year. Such filings must be made within each calendar year, i.e., on or after Jan. 1 and on or before Dec. 30. Failure to file within the calendar year properly results in the claim being extinguished, and therefore abandoned and void.

Failure of a lessee or agent of the owner of an unpatented mining claim to make the filings required by 43 U.S.C. § 1744 (1982) provides no basis for reversal of a decision declaring the claim abandoned and void. Congress assigned the owner of the claim the responsibility of making the required filings; the owner must bear the consequence of filings not timely made.

Comstock Tunnel & Drainage Co. & Sutro Tunnel Co., 87 IBLA 132 (June 7, 1985)

The failure to file the instruments required by sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), and 43 CFR 3833.2-1(b)(1), in the proper office of the Bureau of Land Management within the time periods prescribed therein conclusively constitutes abandonment of the mining claim by the owner.

Clara Holloway Sampson, 87 IBLA 143 (June 10, 1985)

The failure to file the instruments required by sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982) and 43 CFR Subpart 3833, in the proper Bureau of Land Management office within the time periods prescribed therein conclusively constitutes abandonment of the mining claim by the owner.

Myron Cherry, 87 IBLA 165 (June 12, 1985)

The failure to file the instruments required by sec. 314 of FLPMA, 43 U.S.C. § 1744 (1982), and 43 CFR 3833.1 and 3833.2 in the proper Bureau of Land Management office within the time periods prescribed therein conclusively constitutes abandonment of the mining claim by the owner.

There is a presumption of regularity which supports the official acts of public officers in the proper discharge of their duties. When an appellant asserts the affidavit of annual assessment work was mailed to BLM, but lost, appellant must submit evidence

MINING CLAIMS--Continued

ABANDONMENT--Continued

that it was received by BLM in order to overcome this presumption.

Carmelita M. Holland, 87 IBLA 175 (June 13, 1985)

Failure to file instruments required by 43 U.S.C. § 1744 (1982) and 43 CFR 3833.2 in the proper BLM office within the time prescribed results in a conclusive presumption of abandonment of the mining claim.

Howard Gates, 87 IBLA 261 (June 21, 1985)

Failure to file instruments required by 43 U.S.C. § 1744 (1982) and 43 CFR 3822.2 in the proper BLM office within the time prescribed constitutes abandonment of the mining claim.

Karen M. Anderson, 87 IBLA 306 (June 25, 1985)

The owner of a mining claim located after Oct. 21, 1976, is required by sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), to file a notice of intention to hold the claim or evidence of assessment work performed on the claim, in the county where the location notice is of record and in the proper office of BLM prior to Dec. 31 of each year following the calendar year in which the claim is located. Failure to file the instrument required by the statute constitutes an abandoment of the claim.

Gloria T. Bruce, C. Vince Bruce, 87 IBLA 338 (June 26, 1985)

Under the provisions of 43 U.S.C. § 1744 (1982), a mining claimant must file evidence of annual assessment work or a notice of intention to hold each year in a timely manner. Failure to file results in the claim being extinguished, and therefore abandoned and void.

Good Hope Development Co., 87 IBLA 341 (June 26, 1985)

Under the Federal Land Policy and Management Act of 1976, 43 U.S.C § 1744 (1982), and 43 CFR 3833.1-2, the owner of an unpatented mining claim located on Federal land after Oct. 21, 1976, shall file a copy of the official record of the notice of location of the claim with the proper BLM office within 90 days after the date of location of the claim. This requirement is mandatory and failure to comply within the time period prescribed must be deemed conclusively to constitute an abandonment of the mining claim.

Mervil J. Cook, 87 IBLA 348 (June 26, 1985)

Pursuant to 43 CFR 3833.0-5(m), a proof of labor or notice of intention to hold will not be deemed as timely filed where it is mailed in an envelope bearing a clearly dated postmark affixed by the United States Postal Service prior to Dec. 31, within the period prescribed by law, but is not delivered to the proper BLM office by Jan. 19 immediately following.

Alice R. Kirk, 88 IBLA 4 (June 28, 1985)

MINING CLAIMS--Continued

ABANDONMENT--Continued

Failure to file an instrument required by 43 U.S.C. § 1744 (1982) and 43 CFR 3833.2 in the proper BLM office within the time prescribed constitutes abandonment of the mining claim.

William J. Fairse, Glenn Fairse, 88 IBLA 22 (July 2, 1985)

Failure to file instruments required by 43 U.S.C. § 1744 (1982) and 43 CFR 3833.2 in the proper BLM office within the time period prescribed results in a conclusive presumption of abandonment of the mining claim.

Fern L. Evans, Gary L. Carter, 88 IBLA 45 (July 10, 1985)

Failure to file an instrument required by 43 U.S.C. § 1744 (1982) within the prescribed time constitutes abandonment of the mining claim.

Michael R. Ware, 88 IBLA 111 (July 31, 1985)

The failure to file the instruments required by sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), and 43 CFR 3833.2 in the proper office of the Bureau of Land Management within the time periods prescribed therein conclusively constitutes abandonment of the mining claim by the owner.

George W. Wagner, Hazel T. Wagner, 88 IBLA 117 (July 31, 1985)

Frank A. Putnam III, 88 IBLA 314 (Sept. 18, 1985)

Failure to file instruments required by 43 U.S.C. § 1744 (1982) and 43 CFR 3833.2 in the proper BLM office within the time period prescribed results in a conclusive presumption of abandonment of the mining claim. The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced documents filed with them is rebuttable by probative evidence to the contrary. The presumption is not overcome by a statement, without corroborating evidence, that a document was mailed.

John D. O'Keefe (On Reconsideration), 88 IBLA 157 (Aug. 12, 1985)

Where the owner of a mining claim located prior to Oct. 21, 1976, fails to file either a notice of intention to hold, an affidavit of assessment work performed, or a detailed report provided by sec. 28-1 of Title 30, U.S.C., prior to Oct. 22, 1979, the claim is deemed conclusively to have been abandoned and void.

When enacting sec. 314(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), Congress intended to extinguish those claims for which timely filings were not made. Failure to file on time, in and of itself, causes the claims to be lost.

Ralph C. Memmott, 88 IBLA 363 (Sept. 27, 1985)

MINING CLAIMS--Continued

ABANDONMENT--Continued

Under the provisions of 43 U.S.C. § 1744 (1982), an owner of an unpatented mining claim must file evidence of annual assessment work or notice of intention to hold prior to Dec. 31 of each year. Such filings must be made within each calendar year, i.e., on or after Jan. 1 and on or before Dec. 30. Failure to file within the calendar year properly results in the claim being extinguished, and therefore abandoned and void.

When enacting sec. 314(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), Congress intended to extinguish those claims for which timely filings were not made. Failure to file on time, in and of itself, causes the claims to be lost.

Ralph C. Memmott, 88 IBLA 367 (Sept. 27, 1985)

Under the provisions of 43 U.S.C. § 1744 (1982), an owner of an unpatented mining claim must file evidence of annual assessment work or notice of intention to hold prior to Dec. 31 of each year. Such filings must be made within each calendar year, i.e., on or after Jan. 1 and on or before Dec. 30. Failure to file within the prescribed period properly results in the claim being deemed abandoned and void and, therefore, extinguished.

When enacting sec. 314(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), Congress intended to extinguish those claims for which timely filings were not made. Failure to file on time, in and of itself, causes the claims to be lost.

Ralph C. Memmott, 88 IBLA 372 (Sept. 27, 1985)

When a single claim has been recorded with BLM pursuant to 43 U.S.C. § 1744 (1982) on two or more occasions and given two or more mining recordation serial numbers, the proper corrective procedure is to merge the respective files and cancel one or more of the mining claim recordation serial numbers. If, on a combined basis, all requisite filings have been made, the claim should not be conclusively deemed to be abandoned pursuant to 43 U.S.C. § 1744(c) (1982).

Ralph C. Memmott, 88 IBLA 377 (Sept. 27, 1985)

Jurisdiction over disputes between rival mining claimants is reserved to the courts, and it is not for this Department to decide whether one claimant has a better right to a claim because of a rival claimant's alleged failure to file the documents required under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976).

Sandra Memmott, 88 IBLA 379 (Sept. 27, 1985)

ASSAYS

Contestees fail to overcome the Government's prima facie case where assay results are not offered into evidence by contestees, the location of samples is undisclosed, the quantity of gold-bearing material is uncertain, fire assays are used to determine the gold content of a placer claim, and contestees fail to answer a charge of mathematical miscalculation.

United States v. Horace Chapman et al., 87 IBLA 216 (June 18, 1985)

MINING CLAIMS--Continued

ASSESSMENT WORK

The filing of evidence of annual assessment work in the county recording office does not constitute compliance with the recordation requirements of 43 CFR 3833.2-1.

Lanny Ray Southard, 86 IBLA 239 (Apr. 30, 1985)

Mt. Pinos Development Corp., 87 IBLA 102 (May 30, 1985)

Under the provisions of 43 U.S.C. § 1744 (1982), an owner of an unpatented mining claim must file evidence of annual assessment work or notice of intention to hold prior to Dec. 31 of each year. Such filings must be made within each calendar year, i.e., on or after Jan. 1 and on or before Dec. 30. Failure to file within the calendar year properly results in the claim being extinguished, and therefore abandoned and void.

Samuel A. Wright, 86 IBLA 286 (May 13, 1985)

J. E. Stevens, 86 IBLA 291 (May 13, 1985)

Charles H. Haverty, 87 IBLA 23 (May 21, 1985)

The filing of evidence of assessment work in the county recording office does not constitute compliance with the recordation requirements of 43 CFR 3833.2-1.

Charlene & Robert Schilling, 87 IBLA 52 (May 23, 1985)

Where the owner of a mining claim located prior to Oct. 21, 1976, fails to file either a notice of intention to hold, an affidavit of assessment work performed, or a detailed report provided by sec. 28-1 of Title 30, U.S.C., prior to Oct. 22, 1979, the claim is deemed conclusively to have been abandoned and void.

When enacting sec. 314(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), Congress intended to extinguish those claims for which timely filings were not made. Failure to file on time, in and of itself, causes the claims to be lost.

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Under the provisions of 43 U.S.C. § 1744 (1982), an owner of an unpatented mining claim must file evidence of annual assessment work or notice of intention to hold prior to Dec. 31 of each year. Such filings must be made within each calendar year, i.e., on or after Jan. 1 and on or before Dec. 30. Failure to file within the calendar year properly results in the claim being extinguished, and therefore abandoned and void.

When enacting sec. 314(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), Congress intended to extinguish those claims for which timely filings were not made. Failure to file on time, in and of itself, causes the claims to be lost.

Ralph C. Memmott, 88 IBLA 367 (Sept. 27, 1985)

MINING CLAIMS--Continued

ASSESSMENT WORK--Continued

Under the provisions of 43 U.S.C. § 1744 (1982), an owner of an unpatented mining claim must file evidence of annual assessment work or notice of intention to hold prior to Dec. 31 of each year. Such filings must be made within each calendar year, i.e., on or after Jan. 1 and on or before Dec. 30. Failure to file within the prescribed period properly results in the claim being deemed abandoned and void and, therefore, extinguished.

When enacting sec. 314(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), Congress intended to extinguish those claims for which timely filings were not made. Failure to file on time, in and of itself, causes the claims to be lost.

Ralph C. Memmott, 88 IBLA 372 (Sept. 27, 1985)

CONTESTS

A prima facie case against the validity of a mining claim is established when Government mineral examiners testify that they have examined the claim at issue and found no evidence of mineralization sufficient to support a discovery.

The burden upon a contestee in a mining claim contest is to overcome a prima facie case of invalidity by a preponderance of the evidence. The presumptions raised by a prima facie showing of nonmineralization are successfully rebutted where the claimant presents evidence which preponderates on the issue of whether the identified mineral can be mined, removed, and disposed of at a profit.

United States v. Robert L. Hamersley et al., 84 IBLA 377 (Jan. 28, 1985)

Where, following a contest hearing, certain mining claims are declared null and void for lack of discovery of a valuable mineral deposit and the claimant fails to appeal and, in essence, acquiesces in the decision over a long period of time, mining claim recordation filings for the same claims are properly rejected.

Emma Grace Lowe, 87 IBLA 207 (June 18, 1985)

Where the United States contests a mining claim for lack of discovery, the Government must go forward with sufficient evidence to establish prima facie the invalidity of the contested claims. When the Government's prima facie case has been made, the burden then shifts to the claimant to overcome this showing by a preponderance of the evidence.

Contestees fail to overcome the Government's prima facie case where assay results are not offered into evidence by contestees, the location of samples is undisclosed, the quantity of gold-bearing material is uncertain, fire assays are used to determine the gold content of a placer claim, and contestees fail to answer a charge of mathematical miscalculation.

United States v. Horace Chapman et al., 87 IBLA 216 (June 18, 1985)

When the Government contests a mining claim on a charge of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case. Where a Government mineral examiner testifies that he has examined the land within a claim and found the quantity and quality of the minerals insufficient to

MINING CLAIMS--Continued

CONTESTS--Continued

support a finding of discovery, a prima facie case is established.

A finding that a mining claimant has not overcome a prima facie case of invalidity will be affirmed where the evidence shows that the value of the deposit to be mined is less than the cost of mining the deposit.

United States v. Craig Anderson, 88 IBLA 316 (Sept. 18, 1985)

Jurisdiction over disputes between rival mining claimants is reserved to the courts, and it is not for this Department to decide whether one claimant has a better right to a claim because of a rival claimant's alleged failure to file the documents required under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976).

Sandra Memmott, 88 IBLA 379 (Sept. 27, 1985)

DETERMINATION OF VALIDITY

A decision declaring a mining claim null and void ab initio will be reversed on appeal where convincing evidence in the record supports a finding that the claim was in fact located prior to withdrawal of the land from mining.

Ray L. Virgin, 84 IBLA 347 (Jan. 17, 1985)

A prima facie case against the validity of a mining claim is established when Government mineral examiners testify that they have examined the claim at issue and found no evidence of mineralization sufficient to support a discovery.

The burden upon a contestee in a mining claim contest is to overcome a prima facie case of invalidity by a preponderance of the evidence. The presumptions raised by a prima facie showing of nonmineralization are successfully rebutted where the claimant presents evidence which preponderates on the issue of whether the identified mineral can be mined, removed, and disposed of at a profit.

United States v. Robert L. Hamersley et al., 84 IBLA 377 (Jan. 28, 1985)

When the Government contests a mining claim on the basis of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case as to that charge. A prima facie case has been made when a Government mineral examiner testifies that he has examined the exposed workings on a claim and has found the evidence of mineralization insufficient to support a finding of discovery of a valuable mineral deposit. The mining claimant has the ultimate burden of refuting the Government's case by a preponderance of evidence.

A discovery exists where minerals have been found in sufficient quantity and of sufficient quality that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine.

The "marketability test," a refinement of the "prudent man test," requires a claimant to show that a mineral can be extracted, removed, and marketed at a profit. The latter does not set forth a distinct standard, but rather is regarded as complementary to the "prudent man test." Factors such as the cost of

MINING CLAIMS--Continued

DETERMINATION OF VALIDITY--Continued

extraction, removal, and marketing are relevant considerations to determine whether a person of ordinary prudence would be justified in the further expenditure of time and means to develop a paying mine.

United States v. Clyde L. Weekley, 86 IBLA 1 (Mar. 29, 1985)

Where, following a contest hearing, certain mining claims are declared null and void for lack of discovery of a valuable mineral deposit and the claimant fails to appeal and, in essence, acquiesces in the decision over a long period of time, mining claim recordation filings for the same claims are properly rejected.

Emma Grace Lowe, 87 IBLA 207 (June 18, 1985)

Where the United States contests a mining claim for lack of discovery, the Government must go forward with sufficient evidence to establish prima facie the invalidity of the contested claims. When the Government's prima facie case has been made, the burden then shifts to the claimant to overcome this showing by a preponderance of the evidence.

Contestees fail to overcome the Government's prima facie case where assay results are not offered into evidence by contestees, the location of samples is undisclosed, the quantity of gold-bearing material is uncertain, fire assays are used to determine the gold content of a placer claim, and contestees fail to answer a charge of mathematical miscalculation.

United States v. Horace Chapman et al., 87 IBLA 216 (June 18, 1985)

A finding that a mining claimant has not overcome a prima facie case of invalidity will be affirmed where the evidence shows that the value of the deposit to be mined is less than the cost of mining the deposit.

United States v. Craig Anderson, 88 IBLA 316 (Sept. 18, 1985)

DISCOVERY

Generally

A mineral patent applicant bears the burden of showing that he has made a valuable mineral discovery and therefore the patent application must contain sufficient economic and geologic information, such as the description of the discovery points, the workings and the improvements on the claim, and the sampling techniques, to show entitlement and to justify a field examination of the mining claim for the purpose of verifying the information provided.

Dennis J. Kitts, 84 IBLA 338 (Jan. 15, 1985)

A prima facie case against the validity of a mining claim is established when Government mineral examiners testify that they have examined the claim at issue and found no evidence of mineralization sufficient to support a discovery.

The burden upon a contestee in a mining claim contest is to overcome a prima facie case of invalidity by a preponderance of the evidence. The presumptions raised by a prima facie showing of nonmineralization are successfully rebutted where the claimant presents evidence which preponderates on the issue of whether

MINING CLAIMS--Continued

DISCOVERY--Continued

Generally--Continued

the identified mineral can be mined, removed, and disposed of at a profit.

United States v. Robert L. Hamersley et al., 84 IBLA 377 (Jan. 28, 1985)

When the Government contests a mining claim on the basis of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case as to that charge. A prima facie case has been made when a Government mineral examiner testifies that he has examined the exposed workings on a claim and has found the evidence of mineralization insufficient to support a finding of discovery of a valuable mineral deposit. The mining claimant has the ultimate burden of refuting the Government's case by a preponderance of evidence.

A discovery exists where minerals have been found in sufficient quantity and of sufficient quality that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine.

The "marketability test," a refinement of the "prudent man test," requires a claimant to show that a mineral can be extracted, removed, and marketed at a profit. The latter does not set forth a distinct standard, but rather is regarded as complementary to the "prudent man test." Factors such as the cost of extraction, removal, and marketing are relevant considerations to determine whether a person of ordinary prudence would be justified in the further expenditure of time and means to develop a paying mine.

Evidence of mineralization which may justify further exploration, but not development of a mine, does not establish the discovery of a valuable mineral deposit.

Isolated showings of high gold values are not sufficient by themselves to establish the discovery of a valuable mineral deposit.

United States v. Clyde L. Weekley, 86 IBLA 1 (Mar. 29, 1985)

A finding that a mining claimant has not overcome a prima facie case of invalidity will be affirmed where the evidence shows that the value of the deposit to be mined is less than the cost of mining the deposit.

United States v. Craig Anderson, 88 IBLA 316 (Sept. 18, 1985)

ENVIRONMENT

A finding that proposed gold dredging operations will not have a significant impact on the human environment, and that no environmental impact statement is required, is affirmed on appeal where the record establishes that relevant areas of environmental concern have been identified and the determination is the reasonable result of environmental analysis made in light of measures to minimize the environmental impact. Such a determination is not overcome by a stated difference of opinion, unsupported by independent proof, alleging the environmental analysis is erroneous.

Tulkisarmute Native Community Council et al., 88 IBLA 210 (Aug. 28, 1985)

MINING CLAIMS--Continued

EXTRALATERAL RIGHTS

Where a lode mining claim is located partially on withdrawn or patented land, it is not null and void ab initio to the extent of its inclusion of such lands. A locator whose discovery is on lands open to location may extend the end lines and side lines of his claim across withdrawn or patented land to define the extralateral rights to lodes or veins which apex within the claim.

Timberline Mining Co., 87 IBLA 264 (June 24, 1985)

LANDS SUBJECT TO

Where lands were patented under a statute which authorized the granting of nonmineral lands only, the issuance of the patent generally constituted a conclusive determination by the United States of the nonmineral character of the land so patented, and the subsequent discovery of mineral values thereon does not operate to void the conveyance by the United States.

Land acquired by the United States does not become public land by the mere process of its acquisition, and, in the absence of specific statutory direction to the contrary, is not open for location of mining claims under 30 U.S.C. § 22 (1982).

Where a lode mining claim is located partially on patented or withdrawn land, such a claim is not null and void ab initio to the extent of its inclusion of such lands. While the claim may not afford the claimant any rights whatever in the lands into which the claim is partially projected, the configuration of such a claim might, in the proper circumstances, invest the claimant with extralateral rights in other land beyond or adjacent to that land which is closed to mineral entry.

Silver Buckle Mines, Inc., 84 IBLA 306 (Jan. 7, 1985)

BLM properly determined that unpatented mining claims were null and void ab initio when they were located at a time when the land was withdrawn from mineral entry by Executive order for a military reservation and the withdrawal has not been revoked, even if the land is no longer being used for military purposes.

Guadalupe Resources Corp., 84 IBLA 344 (Jan. 16, 1985)

When the United States patents "nonmineral" land to the State of Washington in exchange for State land located within a national forest, the issuance of a patent constitutes a conclusive determination by the United States that the land was nonmineral in character, and, in the absence of fraud, any subsequent identification or discovery of minerals thereon does not operate to void the conveyance by the United States or to create a reservation of the minerals in the United States. Therefore, mining claims located on "nonmineral" land patented to the State without reservation of the mineral estate are null and void ab initio, even though the State at one time mistakenly concluded that the patent did not convey the mineral estate.

David C. Brookens, 85 IBLA 1 (Jan. 30, 1985)

MINING CLAIMS--Continued

LANDS SUBJECT TO--Continued

Where mining claims are located after Oct. 21, 1976, a copy of the notices of location must be filed with the proper office of the Bureau of Land Management within 90 days after the dates of such locations, failing which, the claims must be deemed conclusively to have been abandoned. If, subsequently, the locator files new notices of location bearing a later date, that constitutes a relocation of the former claims, and the new claims date from such relocation. If in the interim between the abandonment of the original claims and the date of their relocation the land is withdrawn, the relocated claims are null and void ab initio.

Mac A. Stevens (On Reconsideration), 85 IBLA 33 (Jan. 31, 1985)

Ordinarily an application to restore lands within a reclamation withdrawal to mineral entry pursuant to the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982), will be rejected by the Bureau of Land Management where the Bureau of Reclamation recommends against restoration. However, on appeal a case may be remanded for further consideration by the appropriate agencies, including preparation of a mineral report, where it appears warranted by the appellant's showings and willingness to accept terms and conditions to protect the Government's interest.

Robert Limbert, Otis Schoolcraft, 85 IBLA 131 (Feb. 19, 1985)

Mining claims located upon lands withdrawn from mineral entry are properly declared null and void ab initio.

Land which has been patented without a reservation of minerals to the United States is not available for the location of mining claims, and mining claims located on such land after it is patented are properly declared null and void ab initio.

Pat Ray McClane, 85 IBLA 241 (Mar. 4, 1985)

A mining claim located on lands which are withdrawn for reclamation purposes under the first form is null and void ab initio. A first-form reclamation withdrawal completed prior to Oct. 21, 1976, remains in effect, subject to review by the Secretary, notwithstanding the repeal of the statute authorizing the initiation of such withdrawals.

William B. Rawlings, 85 IBLA 243 (Mar. 4, 1985)

Where the public records indicate that land is segregated from appropriation by the filing of a state selection application, a mining claim located on such land is properly declared null and void ab initio.

William Mrak et al., 86 IBLA 16 (Mar. 29, 1985)

A mining claim located on land withdrawn from mineral entry at the time of location is properly declared null and void ab initio. The "date of location" of a mining claim is determined by reference to the laws of the state in which the claim is located.

John F. Malone et al., 86 IBLA 85 (Apr. 11, 1985)

MINING CLAIMS--Continued

LANDS SUBJECT TO--Continued

Mining claims located on land previously withdrawn from mineral entry by Exec. Order No. 5327 and Public Land Order No. 4522 are properly declared null and void ab initio.

Azome Utah Mining Co., 86 IBLA 170 (Apr. 25, 1985)

A millsite claim located on land which has been segregated from mineral location is properly declared null and void ab initio.

Clara Holloway Sampson, 87 IBLA 143 (June 10, 1985)

To establish that a location of a mining claim made after a withdrawal is actually an amendment of a prior location made before the withdrawal, a claimant must show the earlier location included the portion of the claim subject to the withdrawal, that the person making the amended location had an unbroken chain of title with the original locators, and that the location predating the withdrawal was properly made.

Russell Hoffman (On Reconsideration), 87 IBLA 146 (June 11, 1985)

A mining claim is properly declared null and void if, at the time of location, the land is withdrawn from appropriation under the mining laws. Once land has been withdrawn from mineral entry, it remains withdrawn until the withdrawal is formally revoked. It is immaterial whether the lands are or will be used for the purpose for which they are withdrawn.

Raymond D. Tilley, 87 IBLA 150 (June 11, 1985)

BLM may properly declare a mining claim located on land withdrawn and closed to mineral entry null and void ab initio. The location date for such mining claim will not relate back to a mining claim located prior to the withdrawal where the previous mining claim was conclusively presumed to be abandoned and void pursuant to sec. 314(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(c) (1982), for failure to record the notice of location in a timely manner.

McCarthy Mining & Development Co., 87 IBLA 172 (June 13, 1985)

Under 43 CFR 2091.6-4 and 2627.4(b), the filing of an application by the State of Alaska to select lands segregates those lands from all subsequent appropriation, including location under the mining law. A mining claim located on land segregated and closed to mineral entry is properly declared null and void ab initio.

Thomas C. Bay, Joyce R. Bay, 87 IBLA 194 (June 13, 1985)

Mining claims located on lands closed to mineral entry are null and void from their inception as a matter of law, and no property rights are created thereby. Therefore, no contest proceeding, notice, or hearing is required preliminary to a decision holding that such claims are invalid. The fact of such claims

MINING CLAIMS--Continued

LANDS SUBJECT TO--Continued

being void does not depend upon any act or decision of an administrative official.

Walter MacEwen, Malcolm MacEwen, 87 IBLA 210 (June 18, 1985)

Where a lode mining claim is located partially on withdrawn or patented land, it is not null and void ab initio to the extent of its inclusion of such lands. A locator whose discovery is on lands open to location may extend the end lines and side lines of his claim across withdrawn or patented land to define the extralateral rights to lodes or veins which apex within the claim.

Timberline Mining Co., 87 IBLA 264 (June 24, 1985)

A mining claim is properly declared null and void if the land at the time of the location is withdrawn from appropriation under the mining laws by a first-form reclamation withdrawal. Once land has been withdrawn from mineral entry, it remains withdrawn until the withdrawal is formally revoked. It is immaterial whether the lands are or will be used for the purpose for which they are withdrawn.

A placer mining claim partially located on land patented without a reservation of minerals to the United States is properly declared null and void to the extent it includes such land.

Florian L. Glineski, Mike Gilleran, 87 IBLA 266 (June 25, 1985)

Under 43 CFR 2091.6-4 and 2627.4(b), the filing of a state's application to select lands, where the filing is regular on its face, segregates the lands from all subsequent appropriation, including location and entry under the mining laws. Where a selection application filed by the State of Alaska pursuant to sec. 6(b) of the Alaska Statehood Act, 72 Stat. 339, seeks to include national forest lands, the application is not regular on its face because national forest lands cannot be selected under authority of sec. 6(b) of the Act.

Under the so-called "notation" or "tract book" rule, after a state selection application is filed and noted on official land office records, the mere notation or recording of the application has the effect of segregating the land from all subsequent appropriations, including locations under the mining laws, regardless of whether the selection application was void or voidable.

It was not error for the Bureau of Land Management to invoke the "notation rule" on the basis of state selection applications noted on its master title plats, regardless of what other records may have conveyed regarding the validity of the applications. The ordinary citizen contemplating a proposed use of the public lands would quite reasonably look to other than lands embraced in Tps. 10 and 11 N., Rs. 2 E., Seward Meridian, upon discerning from the master title plats for these townships that they were included in State selection applications. Further, there is nothing on the face of the master title plats that would suggest the State selection entries were invalid.

Although the Board has on one occasion undertaken an in pari materia consideration of various land status records (i.e., the master title plat, historical index, and serial register sheets for a state selection application) as a further method of determining whether public lands were appropriated at a particular time, this was only done because of a conflict noted between

MINING CLAIMS--Continued

LANDS SUBJECT TO--Continued

the plat and the index. Here, an in pari materia consideration of the historical indices and the serial register sheets in conjunction with the master title plats fails to establish that Chugach National Forest lands (on which appellant's mining claims were located) were excluded from any of the four State selection applications at issue or that such selection applications were rejected in part to the extent national forest lands were included in the applications.

Under regulations in effect before 1976, a withdrawal application segregated all lands affected thereby upon the recording of the application on the master title plat and such segregation remained effective until the application was adjudicated and a notice of determination published in the Federal Register. Withdrawal applications filed after enactment of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1784 (1982), are governed by distinct statutory and regulatory provisions. Thus, under sec. 204 of the Act (43 U.S.C. § 1714) Congress has required that the segregative effect of a withdrawal application terminates upon the expiration of 2 years from the date of the Federal Register notice regarding the filing of the withdrawal application. In view of this clear statutory mandate, it was error for the Bureau of Land Management to extend application of the "notation rule" to Forest Service withdrawal application AA-23139, filed after enactment of the Federal Land Policy and Management Act of 1976, as grounds for rejecting appellants' mining claim locations.

B. J. Tooley, C. D. Tooley, & C. W. Tooley, 88 IBLA 66 (July 23, 1985) 92 I.D. 317

Where land has been patented under a railroad land grant and only the surface estate has been reconveyed to the United States, a mining claim located on such land is properly declared null and void ab initio because the United States does not own the mineral deposits in the lands.

August F. Flachta, 88 IBLA 304 (Sept. 16, 1985)

Mining claims located on land closed to entry and location under the mining laws by a withdrawal order of the Secretary of the Interior pursuant to the Alaska Native Claims Settlement Act are null and void ab initio; however, where such a withdrawal order does not specifically close the land to mineral location, but only to mineral leasing, and there is no indication that mineral location was to be foreclosed, the withdrawal order will not be held to preclude mineral location.

Whelan's Mining & Exploration, Inc., 88 IBLA 336 (Sept. 19, 1985)

Land which has been patented without a reservation of minerals to the United States is not available for the location of mining claims. Mining claims located on such lands are null and void ab initio. Attempts to record such mining claims or file affidavits of assessment work or notices of intent to hold such mining claims are properly rejected.

Lands conveyed to a state as a result of an in-lieu selection are not available for the location of mining claims under the Federal law. Mining claims located on such lands pursuant to the 1872 Mining Law, 30 U.S.C. §§ 21 through 54 (1982), are null and void ab initio.

Ralph C. Mennott, 88 IBLA 360 (Sept. 27, 1985)

MINING CLAIMS--Continued

LANDS SUBJECT TO--Continued

Land which has been patented without a reservation of minerals to the United States is not available for the location of mining claims. Mining claims located on such lands are void ab initio.

Ralph C. Hemmott, 88 IBLA 363 (Sept. 27, 1985)

Ralph C. Hemmott, 88 IBLA 367 (Sept. 27, 1985)

LOCATION

A decision declaring a mining claim null and void ab initio will be reversed on appeal where convincing evidence in the record supports a finding that the claim was in fact located prior to withdrawal of the land from mining.

Ray L. Virgin, 84 IBLA 347 (Jan. 17, 1985)

Location of a mining claim is a purchase of public land within the meaning of 43 U.S.C. § 11 (1982) and the claim may be declared void where it is shown that the locator's spouse who is an employee of the Bureau of Land Management (BLM) has a direct or indirect interest in the claim because "an act done in violation of a statutory prohibition is void and confers no right upon the wrongdoer."

A mining claim is properly declared to be void ab initio, in accordance with 43 CFR 20.735-24, where the locator is the spouse of a BLM employee and the mining claim is located on land administered or controlled by the U.S. Department of the Interior.

Because the Department of the Interior retains control over the validity of mining claims on U.S. Forest Service lands administered by the Department of Agriculture, location of mining claims by the spouse of a BLM employee on such lands is prohibited by 43 CFR 20.735-24.

George R. Schultz et al., 85 IBLA 77 (Feb. 14, 1985)
92 I.D. 83

When BLM declares a mining claim null and void ab initio because the claim was located on land segregated from entry and location under the mining laws, the mining claimant may rebut that finding by showing that he merely amended a valid presegregation location of the claim. However, to do so, he must show that he is the owner of the claim through a regular chain of title. An unsupported allegation that the previous owner "gave" him the claim 24 years ago will not suffice. The United States has the right to invoke the statute of frauds in order to clear title to the public lands.

Hugh B. Fate, Jr., et al., 86 IBLA 215 (Apr. 30, 1985)

Under sec. 314(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(b) (1982), and 43 CFR 3833.1-2, the owner of an unpatented lode or placer mining claim located after Oct. 21, 1976, must file in the proper BLM office, within 90 days after the location of such claim, a copy of the official record of the notice or certificate of location. Failure to do so is deemed conclusively to constitute an abandonment of the claim by the owner. 43 U.S.C. § 1744(c) (1982).

Robert W. Van Wyck, 87 IBLA 245 (June 19, 1985)

MINING CLAIMS--Continued

LOCATION--Continued

There is no limit to the number of claims a person may locate.

Michael R. Ware, 88 IBLA 111 (July 31, 1985)

LODE CLAIMS

BLM may properly declare a placer mining claim null and void ab initio if the location was not perfected by performance of a condition precedent set forth in the order opening the land in a reclamation withdrawal to mineral entry pursuant to sec. 1 of the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982), i.e., execution and recordation of a required stipulation. The mining claimant cannot take advantage of the execution and recordation of the required stipulation in conjunction with a prior lode mining claim allegedly covering the same land when the locator is not the successor in interest with respect to the lode claim.

Red Mountain Mining Co. et al., 85 IBLA 23 (Jan. 30, 1985)

Where a lode mining claim is located partially on withdrawn or patented land, it is not null and void ab initio to the extent of its inclusion of such lands. A locator whose discovery is on lands open to location may extend the end lines and side lines of his claim across withdrawn or patented land to define the extralateral rights to lodes or veins which apex within the claim.

Timberline Mining Co., 87 IBLA 264 (June 24, 1985)

PATENT

Written statements concerning public lands, e.g., proof of improvements of mining claims and proof of posting of notices, need not be sworn statements unless the Secretary in his discretion shall so require.

"Protraction survey" or "protraction diagram." A "protraction survey" or "protraction diagram," which consists of lines drawn on a map that follow the public land survey system, but which is not based upon a field survey with monumentation, is not an official survey and therefore the requirement that a placer mineral patent application be accompanied by a mineral survey of the unsurveyed land is not waived when the unsurveyed land is covered by a protraction survey.

A mineral patent applicant bears the burden of showing that he has made a valuable mineral discovery and therefore the patent application must contain sufficient economic and geologic information, such as the description of the discovery points, the workings and the improvements on the claim, and the sampling techniques, to show entitlement and to justify a field examination of the mining claim for the purpose of verifying the information provided.

Dennis J. Kitts, 84 IBLA 338 (Jan. 15, 1985)

PLACER CLAIMS

BLM may properly declare a placer mining claim null and void ab initio if the location was not perfected by performance of a condition precedent set forth in the order opening the land in a reclamation withdrawal to mineral entry pursuant to sec. 1 of the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982), i.e., execution and recordation of a required stipulation. The mining claimant cannot take advantage of the execution and recordation of the required stipulation in conjunction with a prior lode mining claim allegedly

MINING CLAIMS--Continued

PLACER CLAIMS--Continued

covering the same land when the locator is not the successor in interest with respect to the lode claim.

Red Mountain Mining Co. et al., 85 IBLA 23 (Jan. 30, 1985)

A placer mining claim partially located on land patented without a reservation of minerals to the United States is properly declared null and void to the extent it includes such land.

Florian L. Glineski, Mike Gilleran, 87 IBLA 266 (June 25, 1985)

POWERSITE LANDS

It is error to prohibit placer mining on powersite lands pursuant to the Act of Aug. 11, 1955, merely on the basis that unrestricted and unmitigated mining operations will adversely affect other land uses or values, because (1) there no longer can be unrestricted or unmitigated placer mining on such claims, and (2) all land has some other use or value which would be affected by mining, so that prohibition for that reason would foreclose mining on all powersite lands and effectively nullify the Act. Whether to allow or prohibit mining requires an evaluation of potential detriments and benefits in each specific case, bearing in mind that Congress generally intended that powersite lands would be open to placer location and operation.

United States Forest Service v. Walter D. Milender, 86 IBLA 181 (Apr. 30, 1985) 92 I.D. 175

Lands covered by a preliminary permit of a prospective licensee for a power project, which was issued by the Federal Energy Regulatory Commission and is in its initial term, are not open to mineral location. Mining claims located on such land are void ab initio unless the land has been restored to mineral entry.

Bill Hallock, Walt Hallock, 87 IBLA 126 (June 5, 1985)

Lands covered by a preliminary permit issued to a prospective licensee by the Federal Energy Regulatory Commission are not open to mineral location, and mining claims made on such lands are properly declared null and void ab initio.

The fact that a permittee may not ultimately use all of the land encompassed in his preliminary permit does not alter the fact that land embraced by the permit is not open to location.

Robert Farchi, 88 IBLA 273 (Sept. 5, 1985)

RECORDATION

Where mining claims are located after Oct. 21, 1976, a copy of the notices of location must be filed with the proper office of the Bureau of Land Management within 90 days after the dates of such locations, failing which, the claims must be deemed conclusively to have been abandoned. If, subsequently, the locator files new notices of location bearing a later date, that constitutes a relocation of the former claims, and the new claims date from such relocation. If in the interim between the abandonment of the original claims and the date of their relocation the land is

MINING CLAIMS--Continued

RECORDATION--Continued

withdrawn, the relocated claims are null and void ab initio.

Mac A. Stevens (On Reconsideration), 85 IBLA 33 (Jan. 31, 1985)

Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), the owner of an unpatented mining claim located on public land must file a notice of intention to hold the mining claim or evidence of annual assessment work on the claim prior to Dec. 31 of each year in the proper office of the Bureau of Land Management. There is no provision for waiver of this mandatory requirement, and where evidence of assessment work is not timely filed, for whatever reason, the consequence must be borne by the claimant.

Charlene & Robert Schilling, 87 IBLA 52 (May 23, 1985)

Larry C. Hoffman, 87 IBLA 225 (June 19, 1985)

Where a mining claim was located in July 1969 and a copy of the official record of the notice of location was not filed with the proper BLM office on or before Oct. 22, 1979, the claim was properly declared abandoned and void pursuant to 43 U.S.C. § 1744(c) (1982).

John W. Finn, 87 IBLA 55 (May 23, 1985)

The owner of an unpatented mining claim located after Oct. 21, 1976, is required to file a copy of the official record of the notice of location or certificate of location of the mining claim with the proper BLM office within 90 days after the date of location. The failure to file the required document shall be deemed conclusively to constitute an abandonment of the mining claim by the owner.

Max Lair, 87 IBLA 106 (May 30, 1985)

BLM may properly declare an unpatented mining claim located prior to 1982 abandoned and void under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), where the owner failed to file either evidence of annual assessment work or a notice of intention to hold the claim with BLM on or before Dec. 30, 1982.

The presumption that BLM employees have not lost or misplaced evidence of annual assessment work for an unpatented mining claim, required to be filed by a certain date under sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), will not be overcome by an affidavit that the document was mailed with another document which was received.

Cascade Energy & Metals Corp., Rex Montis Silver Co., 87 IBLA 113 (May 31, 1985)

Mining claims located prior to July 26, 1866, and recorded in accordance with the rules and customs of local mining districts were subsequently recognized as valid mining claims. Such claims, if they remain unpatented, are subject to the mining claim recordation requirement of sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982).

Comstock Tunnel & Drainage Co. & Sutro Tunnel Co., 87 IBLA 132 (June 7, 1985)

MINING CLAIMS--Continued

RECORDATION--Continued

When Congress enacted sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), it intended to extinguish those claims for which timely filings were not made. Evidence of subjective intent to hold the claims is not relevant, as the failure to file an affidavit of assessment work or notice of intent to hold in a timely manner, in and of itself, causes the claim to be lost. The statute specifically provides that failure to comply with applicable filing requirements leads automatically to loss of the claim.

For the purposes of 43 CFR 3833.2-1, "timely filing" means being filed within the time period prescribed by law, or received by Jan. 19, after the period prescribed by law, in an envelope bearing a clear postmark affixed by the United States Postal Service bearing a date within the period prescribed by law. When documents submitted for filing have been lost in the mail and thus not received by BLM, such loss must be borne by the claimant.

Paul E. Hammond, 87 IBLA 139 (June 10, 1985)

The Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a)(2) (1982), and 43 CFR 3833.1-2 require that a mining claimant file with BLM a description of the location of the mining claim sufficient to locate the claimed lands. Where a mining claimant fails to provide such a description with the recordation of the claim, BLM may properly require the filing of such a description within a certain period of time. The failure by the mining claimant to comply with such a request may be considered grounds for declaring the claim abandoned and void in accordance with 43 CFR 3833.4; however, where the claimant provides a map, narrative, or sketch of sufficient detail to identify and locate the claims on the ground, it is improper to declare the claims abandoned and void.

Floyd & Elsie Patrin, 87 IBLA 152 (June 11, 1985)

To comply with 43 U.S.C. § 1744 (1982), the owner of an unpatented mining claim located on public land must file his evidence of annual assessment work on the claim prior to Dec. 31 of each year in the proper office of BLM. By regulation 43 CFR 3833.0-5(m), the Department has considered such documents to be timely filed if placed in an envelope postmarked by the United States Postal Service on or before Dec. 30 and received in the proper BLM office on or before the following Jan. 19. Where the envelope containing the necessary documentation is postmarked Dec. 31, the claim is properly declared abandoned and void.

J. W. Doyle, 87 IBLA 158 (June 11, 1985)

BLM may not declare an unpatented mining claim abandoned and void for failure to file a notice of intention to hold the claim with both the local recording office and BLM on or before Oct. 22, 1979, where the claimant has already filed within the 3-year period following Oct. 21, 1976, pursuant to sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), thereby initiating the statutory requirement to file prior to Dec. 31 of each year thereafter.

Bernice Sheldon, 87 IBLA 161 (June 11, 1985)

MINING CLAIMS--Continued

RECORDATION--Continued

BLM may properly declare an unpatented mining claim located after Oct. 21, 1976, abandoned and void where the claimant failed to file either evidence of annual assessment work or a notice of intention to hold the claim prior to Dec. 31 of the year following the year in which the claim was located, as required by sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982).

Golden Triangle Exploration Co., 87 IBLA 191 (June 13, 1985)

BLM may properly declare an unpatented mining claim located after Oct. 21, 1976, abandoned and void where the notice of location was not filed with BLM until after the statutory deadline for filing that document, i.e., 90 days after the date of location, regardless of the fact that it was mailed on the deadline.

Allen B. Clark, 87 IBLA 204 (June 18, 1985)

Where, following a contest hearing, certain mining claims are declared null and void for lack of discovery of a valuable mineral deposit and the claimant fails to appeal and, in essence, acquiesces in the decision over a long period of time, mining claim recordation filings for the same claims are properly rejected.

Emma Grace Lowe, 87 IBLA 207 (June 18, 1985)

BLM properly declares a mining claim abandoned and void for failure to timely file a certificate of location as required by 43 CFR 3833.1-2 even though the failure to timely file the certificate was attributed to the county's slow return of the document.

August F. Flachta, 87 IBLA 223 (June 18, 1985)

A mining claim is properly declared void where a copy of the recorded notice of location is not filed pursuant to 43 U.S.C. § 1744(b) (1982) and 43 CFR 3833.1-2 in the proper BLM office within 90 days after the date of location.

Robert G. Young, 87 IBLA 249 (June 20, 1985)

Failure to file instruments required by 43 U.S.C. § 1744 (1982) and 43 CFR 3833.2 in the proper BLM office within the time prescribed results in a conclusive presumption of abandonment of the mining claim.

Howard Gates, 87 IBLA 261 (June 21, 1985)

Under 43 U.S.C. § 1744 (1982), the owner of an unpatented mining claim located on or before Oct. 21, 1976, was required to file with the proper office of BLM a copy of the official record of the notice or certificate of location and a copy of the evidence of assessment work on or before Oct. 22, 1979. Failure to make the required filings constitutes an abandonment of the claim by the owner.

Rights acquired under a relocation of a mining claim extinguished pursuant to 43 U.S.C. § 1744 (1982)

MINING CLAIMS--Continued

RECORDATION--Continued

will not relate back to the date of location of the original claim but only to the date of the relocation.

Florian L. Glineski, Mike Gilleran, 87 IBLA 266 (June 25, 1985)

BLM may properly declare an unpatented mining claim abandoned and void pursuant to sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), where the claimant failed to file either evidence of annual assessment work or a notice of intention to hold the claim for 1982 prior to Dec. 31, 1982.

Ronald H. Yowell et al., 87 IBLA 293 (June 25, 1985)

Failure to file instruments required by 43 U.S.C. § 1744 (1982) and 43 CFR 3822.2 in the proper BLM office within the time period prescribed constitutes abandonment of the mining claim.

Karen M. Anderson, 87 IBLA 306 (June 25, 1985)

BLM may properly declare an unpatented mining claim abandoned and void under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), where the owner failed to file with BLM either evidence of annual assessment work or a notice of intention to hold the claim prior to Dec. 31 of each calendar year.

The presumption that BLM employees have not lost or misplaced evidence of annual assessment work for an unpatented mining claim, required to be filed under sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), will not be overcome by an uncorroborated statement that the document was mailed.

Augustine V. Manzanares et al., 87 IBLA 328 (June 26, 1985)

Under the provisions of 43 U.S.C. § 1744 (1982), a mining claimant must file evidence of annual assessment work or a notice of intention to hold each year in a timely manner. Failure to file results in the claim being extinguished, and therefore abandoned and void.

Good Hope Development Co., 87 IBLA 341 (June 26, 1985)

BLM may properly declare an unpatented mining claim abandoned and void for failure to file timely with BLM a copy of the notice of location of the claim, pursuant to sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982).

Ellis Buschman, 87 IBLA 345 (June 26, 1985)

Failure to file instruments required by 43 U.S.C. § 1744 (1982) and 43 CFR 3833.2 in the proper BLM office within the time prescribed constitutes abandonment of the mining claim.

Ronald Edwards, 87 IBLA 367 (June 27, 1985)

MINING CLAIMS--Continued

RECORDATION--Continued

BLM may properly declare an unpatented mining claim abandoned and void where a copy of the notice of location of the claim was not received by BLM until after the deadline for filing under sec. 314(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(b) (1982), although it was purportedly mailed prior thereto.

David L. Richards, 88 IBLA 1 (July 28, 1985)

Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), the owner of an unpatented mining claim located on Federal lands must file a notice of intention to hold the mining claim or evidence of annual assessment work on the claim prior to Dec. 31 of each year in the proper office of the Bureau of Land Management. There is no provision for waiver of this mandatory requirement, and where evidence of assessment work is not timely filed, for whatever reason, the consequence must be borne by the claimant.

Alice R. Kirk, 88 IBLA 4 (June 28, 1985)

A decision declaring an unpatented mining claim located after Oct. 21, 1976, abandoned and void pursuant to sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), will be affirmed where the affidavit of assessment work due on or before Dec. 30, 1983, although filed prior to Jan. 19, 1984, was not received in an envelope postmarked prior to Dec. 31, 1983, such that the claimant can take advantage of 43 CFR 3833.0-5(m).

David H. Holt, 88 IBLA 36 (July 9, 1985)

BLM may properly declare an unpatented mining claim located after Oct. 21, 1976, abandoned and void where a copy of the notice of location was not filed with BLM within 90 days after the date of location of the claim, in accordance with sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982).

H. P. Layne, Contractor, Inc., 88 IBLA 42 (July 10, 1985)

Failure to file instruments required by 43 U.S.C. § 1744 (1982) and 43 CFR 3833.2 in the proper BLM office within the time period prescribed results in a conclusive presumption of abandonment of the mining claim.

Fern L. Evans, Gary L. Carter, 88 IBLA 45 (July 10, 1985)

The owner of an unpatented mining claim located after Oct. 21, 1976, is required to file a copy of the official record of the notice of location or certificate of location of the mining claim with the proper BLM office within 90 days after the date of location. The failure to file the required document shall be deemed conclusively to constitute an abandonment of the mining claim by the owner.

Under 43 CFR 3833.1-2(a) the owner of an unpatented mining claim located after Oct. 21, 1976, must file with BLM within 90 days after the date of location of the claim a copy of the official record of the notice or certificate of location of that claim that was or will be filed under state law. Where a single certificate of location for more than one claim is void under Colorado law as to all claims except the first,

MINING CLAIMS--Continued

RECORDATION--Continued

if properly described, the first claim of 13 claims included in a single certificate of location should be accepted by BLM for recordation under 43 CFR 3833.1-2(a).

Waldron Enterprises Mining, 88 IBLA 54 (July 16, 1985)

BLM may properly declare an unpatented mining claim located in 1977 abandoned and void under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), where the owner failed to file with BLM either evidence of annual assessment work or a notice of intention to hold the claim prior to Dec. 31 of each calendar year following the calendar year in which the claim was located.

Jack Bolke, Paul Pilch, 88 IBLA 58 (July 17, 1985)

BLM may properly declare an unpatented mining claim filed for recordation in 1979 abandoned and void under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), where the owner fails to file with BLM either evidence of annual assessment work or a notice of intention to hold the claim on or before Dec. 31 of calendar years 1980, 1981, and 1982.

Walter L. & Ruth Roman, 88 IBLA 123 (Aug. 1, 1985)

Failure to submit recording fee either with new location or within 30 days of notice of deficiency results in rejection of the attempted recordation.

Arthur A. Gotschall, 88 IBLA 276 (Sept. 5, 1985)

The inference that evidence of assessment work was not timely filed with the Bureau of Land Management (BLM) arising from the absence of such a document from the case file coupled with the presumption that BLM officials have not lost legally significant documents filed with BLM may be overcome by probative evidence to the contrary.

Wells J. Horvereid, 88 IBLA 345 (Sept. 24, 1985)

Land which has been patented without a reservation of minerals to the United States is not available for the location of mining claims. Mining claims located on such lands are null and void ab initio. Attempts to record such mining claims or file affidavits of assessment work or notices of intent to hold such mining claims are properly rejected.

Ralph C. Hemmott, 88 IBLA 360 (Sept. 27, 1985)

Jurisdiction over disputes between rival mining claimants is reserved to the courts, and it is not for this Department to decide whether one claimant has a better right to a claim because of a rival claimant's alleged failure to file the documents required under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976).

Sandra Hemmott, 88 IBLA 379 (Sept. 27, 1985)

MINING CLAIMS--Continued

RELOCATION

Where mining claims are located after Oct. 21, 1976, a copy of the notices of location must be filed with the proper office of the Bureau of Land Management within 90 days after the dates of such locations, failing which, the claims must be deemed conclusively to have been abandoned. If, subsequently, the locator files new notices of location bearing a later date, that constitutes a relocation of the former claims, and the new claims date from such relocation. If in the interim between the abandonment of the original claims and the date of their relocation the land is withdrawn, the relocated claims are null and void ab initio.

Mac A. Stevens (On Reconsideration), 85 IBLA 33 (Jan. 31, 1985)

When BLM declares a mining claim null and void ab initio because the claim was located on land segregated from entry and location under the mining laws, the mining claimant may rebut that finding by showing that he merely amended a valid presegregation location of the claim. However, to do so, he must show that he is the owner of the claim through a regular chain of title. An unsupported allegation that the previous owner "gave" him the claim 24 years ago will not suffice. The United States has the right to invoke the statute of frauds in order to clear title to the public lands.

Hugh B. Fate, Jr., et al., 86 IBLA 215 (Apr. 30, 1985)

To establish that a location of a mining claim made after a withdrawal is actually an amendment of a prior location made before the withdrawal, a claimant must show the earlier location included the portion of the claim subject to the withdrawal, that the person making the amended location had an unbroken chain of title with the original locators, and that the location predating the withdrawal was properly made.

Russell Hoffman (On Reconsideration), 87 IBLA 146 (June 11, 1985)

BLM may properly declare a mining claim located on land withdrawn and closed to mineral entry null and void ab initio. The location date for such mining claim will not relate back to a mining claim located prior to the withdrawal where the previous mining claim was conclusively presumed to be abandoned and void pursuant to sec. 314(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(c) (1982), for failure to record the notice of location in a timely manner.

McCarthy Mining & Development Co., 87 IBLA 172 (June 13, 1985)

Rights acquired under a relocation of a mining claim extinguished pursuant to 43 U.S.C. § 1744 (1982) will not relate back to the date of location of the original claim but only to the date of the relocation.

Florian L. Glineski, Mike Gillerson, 87 IBLA 266 (June 25, 1985)

MINING CLAIMS--Continued

SPECIAL ACTS

BLM may properly declare a placer mining claim null and void ab initio if the location was not perfected by performance of a condition precedent set forth in the order opening the land in a reclamation withdrawal to mineral entry pursuant to sec. 1 of the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982), i.e., execution and recordation of a required stipulation. The mining claimant cannot take advantage of the execution and recordation of the required stipulation in conjunction with a prior lode mining claim allegedly covering the same land when the locator is not the successor in interest with respect to the lode claim.

Red Mountain Mining Co. et al., 85 IBLA 23 (Jan. 30, 1985)

Ordinarily an application to restore lands within a reclamation withdrawal to mineral entry pursuant to the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982), will be rejected by the Bureau of Land Management where the Bureau of Reclamation recommends against restoration. However, on appeal a case may be remanded for further consideration by the appropriate agencies, including preparation of a mineral report, where it appears warranted by the appellant's showings and willingness to accept terms and conditions to protect the Government's interest.

Robert Limbert, Otis Schoolcraft, 85 IBLA 131 (Feb. 19, 1985)

It is error to prohibit placer mining on powersite lands pursuant to the Act of Aug. 11, 1955, merely on the basis that unrestricted and unmitigated mining operations will adversely affect other land uses or values, because (1) there no longer can be unrestricted or unmitigated placer mining on such claims, and (2) all land has some other use or value which would be affected by mining, so that prohibition for that reason would foreclose mining on all powersite lands and effectively nullify the Act. Whether to allow or prohibit mining requires an evaluation of potential detriments and benefits in each specific case, bearing in mind that Congress generally intended that powersite lands would be open to placer location and operation.

United States Forest Service v. Walter D. Milender, 86 IBLA 181 (Apr. 30, 1985) 92 I.D. 175

SURFACE USES

Where the locator of a mining claim has discovered a valuable mineral deposit within the limits of his claim, the locator is granted, pursuant to 30 U.S.C. § 26 (1982), the exclusive right of possession of the surface of the claim subject to the limitations of sec. 4(b) of the Surface Resources Act, 30 U.S.C. § 612(b) (1982), if applicable, and subject to the further limitation that such rights are restricted, until the purchase price is paid, to uses reasonably incident to actual mining.

Nothing in the general mining laws invests a locator with the right to initiate occupancy on a mining claim absent a showing that such occupancy is reasonably incident to mining activities.

Where ongoing mining activities are taking place, a challenge to occupancy as being not reasonably incident to mining requires that the mining claimant be given notice and an opportunity for a hearing at which he might establish that his occupancy is reasonably related to his actual mining operations, prior to issuance of an order directing that occupancy cease.

Under the regulations adopted by the Bureau of Land Management, the authorized officer has no

MINING CLAIMS--Continued

SURFACE USES--Continued

authority to approve or disapprove the contents of a notice of intent to commence mining operations filed under 43 CFR 3809.1-3(a). Therefore, where an operator has failed to timely file pursuant to that section, a notice of noncompliance may be issued, but such notice is necessarily limited in scope to requiring the operator to submit a notice.

Pursuant to 43 CFR 3809.3-2(d), a notice of noncompliance properly issues upon a determination that a use to which a mining claim may properly be put is occurring in such a manner as to result in unnecessary or undue degradation of the land.

While mining claimants are required to obtain all necessary state permits relating to mining activities, a notice of noncompliance based on the failure to obtain such permits can only be sustained where the authorized officer delineates exactly which permits were required and provides sufficient factual background to support this conclusion.

Bruce W. Crawford et ux., 86 IBLA 350 (May 17, 1985) 92 I.D. 208

TITLE

A quitclaim deed conveys only the interest held by the grantor. Conveyance by quitclaim deed of an interest in a mining claim which is properly held to have been void ab initio conveys no interest to the grantee.

George R. Schultz et al., 85 IBLA 77 (Feb. 14, 1985) 92 I.D. 63

WITHDRAWN LAND

Where a lode mining claim is located partially on patented or withdrawn land, such a claim is not null and void ab initio to the extent of its inclusion of such lands. While the claim may not afford the claimant any rights whatever in the lands into which the claim is partially projected, the configuration of such a claim might, in the proper circumstances, invest the claimant with extralateral rights in other land beyond or adjacent to that land which is closed to mineral entry.

Silver Buckle Mines, Inc., 84 IBLA 306 (Jan. 7, 1985)

A decision declaring a mining claim null and void ab initio will be reversed on appeal where convincing evidence in the record supports a finding that the claim was in fact located prior to withdrawal of the land from mining.

Ray L. Virgin, 84 IBLA 347 (Jan. 17, 1985)

Where mining claims are located after Oct. 21, 1976, a copy of the notices of location must be filed with the proper office of the Bureau of Land Management within 90 days after the dates of such locations, failing which, the claims must be deemed conclusively to have been abandoned. If, subsequently, the locator files new notices of location bearing a later date, that constitutes a relocation of the former claims, and the new claims date from such relocation. If in the interim between the abandonment of the original claims and the date of their relocation the land is

MINING CLAIMS--Continued

WITHDRAWN LAND--Continued

withdrawn, the relocated claims are null and void ab initio.

Mac A. Stevens (On Reconsideration), 85 IBLA 33 (Jan. 31, 1985)

Ordinarily an application to restore lands within a reclamation withdrawal to mineral entry pursuant to the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982), will be rejected by the Bureau of Land Management where the Bureau of Reclamation recommends against restoration. However, on appeal a case may be remanded for further consideration by the appropriate agencies, including preparation of a mineral report, where it appears warranted by the appellant's showings and willingness to accept terms and conditions to protect the Government's interest.

Robert Limbert, Otis Schoolcraft, 85 IBLA 131 (Feb. 19, 1985)

A mining claim located on land previously withdrawn from appropriation under the mining laws by a first form reclamation withdrawal is null and void ab initio.

Maynard C. Campbell, Jr., 85 IBLA 295 (Mar. 13, 1985)

A mining claim located on land withdrawn from mineral entry at the time of location is properly declared null and void ab initio. The "date of location" of a mining claim is determined by reference to the laws of the state in which the claim is located.

John F. Malone et al., 86 IBLA 85 (Apr. 11, 1985)

Mining claims located on land previously withdrawn from mineral entry by Exec. Order No. 5327 and Public Land Order No. 4522 are properly declared null and void ab initio.

Azome Utah Mining Co., 86 IBLA 170 (Apr. 25, 1985)

Lands covered by a preliminary permit of a prospective licensee for a power project, which was issued by the Federal Energy Regulatory Commission and is in its initial term, are not open to mineral location. Mining claims located on such land are void ab initio unless the land has been restored to mineral entry.

Bill Hallock, Walt Hallock, 87 IBLA 126 (June 5, 1985)

A millsite claim located on land which has been segregated from mineral location is properly declared null and void ab initio.

Clara Holloway Sampson, 87 IBLA 143 (June 10, 1985)

To establish that a location of a mining claim made after a withdrawal is actually an amendment of a prior location made before the withdrawal, a claimant must show the earlier location included the portion of the claim subject to the withdrawal, that the person making the amended location had an unbroken chain of

MINING CLAIMS--Continued

WITHDRAWN LAND--Continued

title with the original locators, and that the location predating the withdrawal was properly made.

Russell Hoffman (On Reconsideration), 87 IBLA 146 (June 11, 1985)

A mining claim is properly declared null and void if, at the time of location, the land is withdrawn from appropriation under the mining laws. Once land has been withdrawn from mineral entry, it remains withdrawn until the withdrawal is formally revoked. It is immaterial whether the lands are or will be used for the purpose for which they are withdrawn.

Raymond D. Dilley, 87 IBLA 150 (June 11, 1985)

BLM may properly declare a mining claim located on land withdrawn and closed to mineral entry null and void ab initio. The location date for such mining claim will not relate back to a mining claim located prior to the withdrawal where the previous mining claim was conclusively presumed to be abandoned and void pursuant to sec. 314(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(c) (1982), for failure to record the notice of location in a timely manner.

McCarthy Mining & Development Co., 87 IBLA 172 (June 13, 1985)

Under 43 CFR 2091.6-4 and 2627.4(b), the filing of an application by the State of Alaska to select lands segregates those lands from all subsequent appropriation, including location under the mining law. A mining claim located on land segregated and closed to mineral entry is properly declared null and void ab initio.

Thomas C. Bay, Joyce R. Bay, 87 IBLA 194 (June 13, 1985)

Mining claims located on lands closed to mineral entry are null and void from their inception as a matter of law, and no property rights are created thereby. Therefore, no contest proceeding, notice, or hearing is required preliminary to a decision holding that such claims are invalid. The fact of such claims being void does not depend upon any act or decision of an administrative official.

Walter MacEwen, Malcolm MacEwen, 87 IBLA 210 (June 18, 1985)

Where a lode mining claim is located partially on withdrawn or patented land, it is not null and void ab initio to the extent of its inclusion of such lands. A locator whose discovery is on lands open to location may extend the end lines and side lines of his claim across withdrawn or patented land to define the extralateral rights to lodes or veins which apex within the claim.

Timberline Mining Co., 87 IBLA 264 (June 24, 1985)

MINING CLAIMS--Continued

WITHDRAWN LAND--Continued

A mining claim is properly declared null and void if the land at the time of the location is withdrawn from appropriation under the mining laws by a first-form reclamation withdrawal. Once land has been withdrawn from mineral entry, it remains withdrawn until the withdrawal is formally revoked. It is immaterial whether the lands are or will be used for the purpose for which they are withdrawn.

Florian L. Glineski, Mike Gilleran, 87 IBLA 266 (June 25, 1985)

Mining claims located on land closed to entry and location under the mining laws by a withdrawal order of the Secretary of the Interior pursuant to the Alaska Native Claims Settlement Act are null and void ab initio; however, where such a withdrawal order does not specifically close the land to mineral location, but only to mineral leasing, and there is no indication that mineral location was to be foreclosed, the withdrawal order will not be held to preclude mineral location.

Whelan's Mining & Exploration, Inc., 88 IBLA 336 (Sept. 19, 1985)

MINING CLAIMS RIGHTS RESTORATION ACT

Lands covered by a preliminary permit of a prospective licensee for a power project, which was issued by the Federal Energy Regulatory Commission and is in its initial term, are not open to mineral location. Mining claims located on such land are void ab initio unless the land has been restored to mineral entry.

Bill Hallock, Walt Hallock, 87 IBLA 126 (June 5, 1985)

Lands covered by a preliminary permit issued to a prospective licensee by the Federal Energy Regulatory Commission are not open to mineral location, and mining claims made on such lands are properly declared null and void ab initio.

The fact that a permittee may not ultimately use all of the land encompassed in his preliminary permit does not alter the fact that land embraced by the permit is not open to location.

Robert Farchi, 88 IBLA 273 (Sept. 5, 1985)

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

GENERALLY

A decision to implement a timber sale proposal based on a finding of no significant impact may be remanded where the environmental assessment for the sale, which supplements and is tiered to the programmatic environmental impact statement for the 10-year timber management program in the district, fails to adequately consider the site-specific impacts of the sale including any aspects of the timber sale which vary significantly from the parameters considered in the programmatic environmental impact statement.

In re Humpy Mountain Timber Sale, 88 IBLA 7 (June 28, 1985)

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969--Continued

ENVIRONMENTAL STATEMENTS

A decision to issue oil and gas leases within an area of critical environmental concern pursuant to a categorical exclusion review will ordinarily be set aside and remanded for preparation of an environmental assessment where the categorical exclusion review discloses potential adverse impacts on threatened and endangered species. This constitutes an exception to the categorical exclusion review process under Departmental procedures, 516 DM 2, Append. 2, § 2.8.

Analysis of the impact of a proposed action under the National Environmental Policy Act, as amended, 42 U.S.C. § 4332 (1982), is required prior to an irrevocable commitment of resources. A decision deferring preparation of an environmental assessment and/or environmental impact statement in connection with issuance of a noncompetitive onshore oil and gas lease until such time as a site-specific plan of operations is submitted by the lessee may be affirmed where the lessee's right to surface occupancy is conditioned upon approval of a site-specific plan of operations in light of that environmental analysis.

Sierra Club Legal Defense Fund, Inc., Natural Resources Defense Council, Inc., California Wilderness Coalition, 84 IBLA 311 (Jan. 7, 1985) 92 I.D. 37

Execution of a cooperative agreement between the Bureau of Land Management and a state wildlife management agency providing for study and preservation of wildlife habitat does not ordinarily constitute a proposal for major Federal action which may adversely affect the human environment requiring preparation of an environmental impact statement.

Lane County Audubon Society et al., 85 IBLA 185 (Feb. 26, 1985)

Where, subsequent to the issuance of a final programmatic EIS detailing a specific level of clearcutting activities, it is determined to substantially increase the amount of acreage to be clearcut, far beyond any level reasonably foreseeable by a review of the EIS, BLM must either issue a new EIS or a supplemental EIS prior to implementing the increased level of clearcutting.

In re Upper Floras Timber Sale et al., 86 IBLA 296 (May 13, 1985)

Where review of the environmental consequences of a proposed action discloses gaps in relevant information or scientific uncertainty, the gaps or uncertainty must be disclosed. If the information relative to adverse impacts is essential to a reasoned choice among alternatives and the cost of obtaining it is exorbitant, the agency shall weigh the need for the action against the risk and severity of possible adverse impacts. Such consideration shall include a worst-case analysis and an indication of the probability or improbability of its occurrence.

The presence of gaps in information regarding the adverse effects of a herbicide on the human environment may stem from lack of knowledge as well as from a dispute among experts regarding the inferences to be drawn from existing information.

Federal action within the meaning of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4361 (1982), may be found not only where an agency proposes to undertake an action itself, but also where an agency makes a decision which permits action by another party. Ordinarily some overt act by a federal agency in support of another party's action is required to establish federal action. Federal action may be found where there is federal funding as well as federal

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969--Continued

ENVIRONMENTAL STATEMENTS--Continued

approval of action conducted by state and local authorities on the public domain.

Idaho Natural Resources Legal Foundation, 88 IBLA 201 (Aug. 28, 1985)

A finding that proposed gold dredging operations will not have a significant impact on the human environment, and that no environmental impact statement is required, is affirmed on appeal where the record establishes that relevant areas of environmental concern have been identified and the determination is the reasonable result of environmental analysis made in light of measures to minimize the environmental impact. Such a determination is not overcome by a stated difference of opinion, unsupported by independent proof, alleging the environmental analysis is erroneous.

Public opposition to a proposed project alone is an insufficient basis to require preparation of an environmental impact statement; such opposition does not make a proposed action controversial within the meaning of 40 CFR 1508.27(b)(4).

Tulkisarmute Native Community Council et al., 88 IBLA 210 (Aug. 28, 1985)

NAVIGABLE WATERS

A lake is navigable in fact when it is used, or is susceptible of being used, in its ordinary condition, as a highway for commerce, over which trade and travel are or may be conducted. Whether a lake in Montana is navigable for purposes of determining title to the lakebed depends upon whether there is evidence to show the lake had been used or was susceptible of being used as a highway for commerce at the time Statehood was conferred upon Montana in 1889.

State of Montana, 88 IBLA 382 (Sept. 27, 1985)

NOTICE

GENERALLY

All persons dealing with the government are presumed to have knowledge of relevant statutes and duly promulgated regulations.

Michael R. Ware, 88 IBLA 111 (July 31, 1985)

Where BLM mails a notice to the first-drawn applicant in a simultaneous oil and gas lease drawing requiring the applicant to execute a lease offer and tender the first year's rental in accordance with 43 CFR 3112.6-1(a), the failure to return the rental payment and executed lease offer within the 30-day period properly results in rejection of the offer. The offeror's absence from his address of record when the notice was received at that address will not excuse noncompliance with 43 CFR 3112.6-1.

Richard L. Knowles, 88 IBLA 120 (Aug. 1, 1985)

OIL AND GAS

GENERALLY

BLM may properly rely on public hearings conducted, and adopt past and future decisions rendered by a State board with respect to oil and gas conservation within Indian lands where BLM retains the ultimate jurisdiction to approve such decisions and, in fact, exercises an independent review function prior to such adoption.

Assiniboine & Sioux Tribes, 85 IBLA 39 (Feb. 5, 1985)

PIPELINES

Rights-of-Ways

Where the Bureau of Land Management proposes to resolve the conflicts and inconsistencies in its appraisal method used to determine fair market rental values for natural gas pipeline rights-of-way, granted pursuant to the Act of Feb. 25, 1920, as amended, 30 U.S.C. § 185 (1982), the Board will set aside decisions based on the going rate method of appraisal, and remand such questions to the Bureau of Land Management for further action consistent with the result of BLM's analysis.

An oil and gas lease issued pursuant to the Act of Feb. 25, 1920, 30 U.S.C. § 181 (1982), grants to the lessee no rights in lands outside the subdivisions described in the lease. Off-lease facilities on Federal lands, regardless of their nature, on-lease oil and gas transportation facilities, and on-lease commercial facilities may be constructed only after an appropriate right-of-way has been granted. Sec. 28 of the Act, 30 U.S.C. § 185 (1982), does not apply to on-lease production facilities which are included in a surface use and operations plan, and which are authorized by the approval of an application to conduct leasehold operations or construction activities, such as an application for permit to drill. However, where on-lease gathering facilities are constructed by an individual who is neither the lessee nor the operator, such activities constitute "commercial operations" and are permissible only after obtaining a right-of-way under sec. 28.

No authority exists in either sec. 28 of the Act of Feb. 25, 1920, 30 U.S.C. § 185 (1982), or in the regulations issued thereunder to support a request that BLM refrain from collecting 6 years of back use charges for the unauthorized use of rights-of-way on the Federal lands.

BLM's right to reappraise every 5 years a right-of-way issued pursuant to sec. 28 of the Act of Feb. 25, 1920, 30 U.S.C. § 185 (1982), is but one factor that BLM has considered in arriving at an adjusted going rate for BLM rights-of-way. BLM's adjusted going rate is calculated by reducing by 30 percent the industry going rate for rights-of-way on private lands.

Gas Co. of New Mexico, 88 IBLA 240 (Sept. 3, 1985)

OIL AND GAS LEASES

GENERALLY

A protest within the meaning of 43 CFR 4.450-2 is an objection "to any action proposed to be taken" in any proceeding before the Bureau of Land Management. A protest to the issuance of an oil and gas lease filed after the lease has issued by one not previously a

OIL AND GAS LEASES--Continued

GENERALLY--Continued

party to the case is not timely, and dismissal of such a protest will be affirmed on appeal.

Sierra Club Legal Defense Fund, Inc., Natural Resources Defense Council, Inc., California Wilderness Coalition, 84 IBLA 311 (Jan. 7, 1985) 92 I.D. 37

Where an oil and gas operator is assessed a penalty for failure to obtain approval from the Bureau of Land Management under 43 CFR 3162.3-3 prior to constructing a flowline in connection with an oil and gas well, but the penalty is assessed under a subsection of the regulations which deals with an entirely different regulation, and it appears that there is no assessment prescribed for violation of 43 CFR 3162.3-3, the decision will be reversed.

Wintershall Oil & Gas Corp., 85 IBLA 101 (Feb. 14, 1985)

When the lessee fails to pay rentals on or before the anniversary date of the lease, and no oil or gas in paying quantities is being produced on the leased premises, the lease shall automatically terminate by operation of law pursuant to 30 U.S.C. § 188(b) (1982). The Secretary may reinstate the lease, pursuant to 30 U.S.C. § 188(b) (1982), if the full rental is paid within 20 days of the lease anniversary date and the failure to timely pay the rental was justifiable or not due to a lack of reasonable diligence. When the failure to timely pay the rental was due to the lessee's own neglect, the failure to timely pay is neither justifiable nor demonstrative of reasonable diligence. Therefore a petition for reinstatement under 30 U.S.C. § 188(c) (1982) must be rejected.

Edgar B. Stern, 86 IBLA 72 (Apr. 10, 1985)

An oil and gas lease application must be rejected pursuant to 43 CFR 3112.2-1(d) (1982) where the applicant uses as its address the address of another person or entity in the business of providing assistance to those participating in the simultaneous oil and gas leasing system.

Oscar Mineral Group #3, 87 IBLA 48 (May 23, 1985)

When the lessee fails to pay rental on or before the anniversary date of the lease, and no oil and gas in paying quantities is being produced on the leased premises, the lease shall automatically terminate by operation of law pursuant to 30 U.S.C. § 188(b) (1982). The Secretary may reinstate the lease, pursuant to 30 U.S.C. § 188(c) (1982), if the full rental is paid within 20 days of the lease anniversary date and the failure to timely pay the rental was justifiable or not due to a lack of reasonable diligence. When the failure to timely pay the rental was due to the lessee's own neglect, the failure to timely pay is neither justifiable nor demonstrative of reasonable diligence. Therefore, a petition for reinstatement under 30 U.S.C. § 188(c) (1982) must be rejected.

Freedom Oil Co., Inc., 87 IBLA 71 (May 28, 1985)

The Secretary of the Interior may properly delegate the authority to suspend oil and gas leases, and, the party to whom this authority is delegated may

OIL AND GAS LEASES--Continued

GENERALLY--Continued

act on behalf of the Secretary in approving applications for suspension.

American Resource Management Corp. (On Judicial Remand), 88 IBLA 172 (Aug. 20, 1985)

ACQUIRED LANDS LEASES

Under 43 CFR 3101.2-3 (1980), a noncompetitive over-the-counter offer for acquired lands which included a request for less than an entire tract of acquired land was required to describe the land by course and distance between the successive angle points of the boundary of the tract sought and was further required to be accompanied by a map showing the land sought. Where an offer did not so describe the land, it could afford the offeror no priority.

John R. Chitwood III, 84 IBLA 300 (Jan. 2, 1985)

While the general Departmental policy is not to suspend oil and gas lease offers to await possible future leasing of lands, the policy is not without exception. Where circumstances warrant suspension and suspension is not precluded by 43 CFR 2091.1, oil and gas lease offers for acquired lands in the Nueces River Project under the jurisdiction of the Bureau of Reclamation may be suspended until the Bureau of Reclamation has completed its oil and gas management plan for that area.

Dinero Oil Corp., 84 IBLA 394 (Jan. 28, 1985)

BLM may properly reject an acquired lands noncompetitive oil and gas lease offer filed for public domain lands.

Sam C. McReynolds, 85 IBLA 36 (Jan. 31, 1985)

In the absence of a proper receptacle for the receipt outside of established business hours of personally delivered filings, it was not improper for a BLM employee, prior to the opening of the BLM office, to receive acquired lands oil and gas lease offers in the hallway of the BLM office on the condition that they would be time and date stamped as of the opening of the office. An individual who voluntarily declined to submit his offer at that time cannot be heard later to claim unfair treatment and protest loss of priority because the offer presented by him was machine time stamped 1 minute after the opening of the office.

Harris-Headrick, 85 IBLA 48 (Feb. 6, 1985)

A noncompetitive oil and gas lease offer for acquired land not within the area of the public land surveys may properly describe the land in the offer by metes and bounds giving the course and distance between successive angle points on the boundary of the tract.

An oil and gas lease offer is considered to be an offer to lease any and all lands described therein. The fact that part of a tract of land described in an oil and gas lease offer is unavailable for leasing does not ordinarily require rejection of the entire lease offer.

Bruce Anderson, 85 IBLA 270 (Mar. 6, 1985)

OIL AND GAS LEASES--Continued

ACQUIRED LANDS LEASES--Continued

The Mineral Leasing Act for Acquired Lands of 1947, as amended, 30 U.S.C. §§ 351-359 (1982), requires that the consent of the administrative agency having jurisdiction over acquired land described in a lease application be obtained prior to the issuance of a lease for such land. Absent consent, the Department of the Interior is without authority to issue a lease.

Beard Oil Co., 88 IBLA 268 (Sept. 4, 1985)

APPLICATIONS

Generally

Where an applicant for a simultaneous oil and gas lease fails to designate a state prefix on the automated application form, such application is properly deemed unacceptable under 43 CFR 3112.3(a) (1983), and the applicant is properly assessed a service charge of $75 per application form and all other filing fees are returned.

Denver Resources, Inc., 84 IBLA 327 (Jan. 8, 1985)

Under 30 U.S.C. § 226(b) (1982), lands within the known geological structure of a producing oil or gas field may be leased only by competitive bidding. Where lands are determined to be within such a structure after a simultaneous oil and gas lease drawing but prior to issuance of a lease, a lease offer for such lands must be rejected. The offeror has no vested rights to issuance of a lease.

Where BLM rejects a noncompetitive oil and gas lease offer on the grounds the parcel sought to be leased lies within a known geologic structure, in the absence of supporting geological data in the record on appeal, a challenge to the determination requires the decision be set aside as unsupported in fact.

Carolyn J. McCutchin, 84 IBLA 368 (Jan. 24, 1985)

Under 30 U.S.C. § 226(b) (1982), lands within the known geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where lands are determined to be within such a structure after a simultaneous oil and gas lease drawing but prior to issuance of a lease, a simultaneous oil and gas lease application for such lands must be rejected. The applicant has no vested rights to issuance of a lease.

An applicant for a simultaneous oil and gas lease who challenges a determination by BLM that land is within the known geologic structure of a producing oil or gas field has the burden of showing that the determination is in error.

R. K. O'Connell, 85 IBLA 29 (Jan. 30, 1985)

A successful applicant in a simultaneous oil and gas lease drawing does not acquire a vested right to obtain an oil and gas lease but merely obtains the right for priority of consideration should a noncompetitive oil and gas lease ultimately issue.

William L. Ahls, 85 IBLA 66 (Feb. 11, 1985)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Generally--Continued

Pursuant to 30 U.S.C. § 226(b) (1982), lands within the geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where the lands are determined to be within a known geologic structure prior to issuance of a lease, a simultaneous oil and gas lease offer for such lands must be rejected.

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of establishing that the determination is in error. The determination will not be disturbed in the absence of a clear and definite showing of error.

Evelyn D. Buckstuhl, 85 IBLA 69 (Feb. 11, 1985)

Lands within a known geologic structure of a producing oil or gas field may only be leased by competitive bidding pursuant to 43 CFR 3120. A noncompetitive oil and gas lease offer filed before the lands were determined to be within a known geologic structure but not accepted by the United States on the date of determination is properly rejected.

V. H. Jernigan, 85 IBLA 138 (Feb. 20, 1985)

Under 30 U.S.C. § 226(b) (1982) land within the known geologic structure of a producing oil or gas field may only be leased by competitive bidding, and where land is determined to be within such a structure while a noncompetitive lease offer is pending, the offer must be rejected.

An applicant for a noncompetitive oil and gas lease who challenges a determination by the Geological Survey that land is within the known geologic structure of a producing oil or gas field is required to show by a preponderance of the evidence considered that the determination is in error.

Mary Nan Spear, 85 IBLA 303 (Mar. 15, 1985)

Pursuant to 30 U.S.C. § 226(b) (1982), where a portion of a noncompetitive lease offer is determined to be within a known geological structure of a producing oil or gas field, that portion within the known geological structure may only be leased by competitive bidding. Where lands are determined to be within a known geological structure at any time prior to issuance of a lease, an oil and gas lease offer for such lands must be rejected. An applicant for an oil and gas lease has no vested rights to issuance of a lease. The drawing of a simultaneous oil and gas lease application merely establishes the priority of filing an offer; it does not create any property or contract rights.

Satellite 83051A1, 85 IBLA 307 (Mar. 19, 1985)

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of showing that the determination is in error. Where appellant fails to show error, the determination will be upheld.

John F. Progan, 85 IBLA 379 (Mar. 26, 1985)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Generally--Continued

Under 30 U.S.C. § 226(b) (1982), lands within the known geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where lands are determined to be within such a structure after a simultaneous oil and gas lease drawing but prior to issuance of a lease, a lease offer for such lands must be rejected. The offeror has no vested rights to issuance of a lease.

Where BLM rejects a noncompetitive oil and gas lease offer on the grounds the parcel sought to be leased lies within a known geologic structure, in the absence of supporting geological data in the record on appeal, a challenge to the KGS determination requires the decision be set aside as unsupported in fact.

Carolyn J. McCutchin, 86 IBLA 13 (Mar. 29, 1985)

Pursuant to 30 U.S.C. § 226(b) (1982), lands within the known geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where lands are determined to be within such a structure, a noncompetitive lease offer for such lands must be rejected.

An applicant for a noncompetitive oil and gas lease who challenges a determination that the land is within the known geologic structure of a producing oil or gas field has the burden of showing that the determination is in error.

Champlin Petroleum Co., 86 IBLA 37 (Apr. 9, 1985)

Where an individual whose application has been drawn with first priority for an oil and gas lease in the simultaneous leasing program fails to submit the signed lease offers or the advance rentals within 30 days of notice by BLM, the application must be rejected, regardless of any justification which the applicant may provide for his failure to timely transmit the documents.

F. Miles Ezell, Sr., 86 IBLA 146 (Apr. 25, 1985)

Lands within a known geologic structure of a producing oil or gas field may only be leased by competitive bidding pursuant to 43 CFR Subpart 3120. A noncompetitive oil and gas lease offer filed before the lands were determined to be within a known geologic structure but not accepted by the United States on the date of determination is properly rejected.

Norma Richardson, 86 IBLA 168 (Apr. 25, 1985)

It is proper for BLM to reject a simultaneous oil and gas lease application submitted with uncollectible filing fees. 43 CFR 3112.2-2(c) (1982) disqualifies simultaneous oil and gas lease applications submitted with uncollectible filing fees and requires payment of the debt as a condition precedent to further participation in the simultaneous leasing program.

An oil and gas lease application must be rejected pursuant to 43 CFR 3112.2-1(d) (1982) where the applicant uses as its address the address of another person or entity in the business of providing assistance to those participating in the simultaneous oil and gas leasing system.

Oscar Mineral Group #3, 87 IBLA 48 (May 23, 1985)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Generally--Continued

A simultaneously filed oil and gas lease application which attains priority must be rejected where the applicant fails to submit the executed lease agreement and first year's advance rental payment within 30 days after receipt of notice to do so, even where the applicant has experienced a business disaster during that period.

Joann S. Bennett, 87 IBLA 121 (May 31, 1985)

Under 30 U.S.C. § 226(b) (1982), lands within the known geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where lands are determined to be within such a structure after a simultaneous oil and gas lease drawing but prior to issuance of a lease, a simultaneous oil and gas lease application for such lands must be rejected. The applicant has no vested right to issuance of a lease.

An applicant for a simultaneous oil and gas lease who challenges a determination by BLM that land is within the known geologic structure of a producing oil or gas field has the burden of showing the determination is in error.

Leonard Luning, 87 IBLA 123 (May 31, 1985)

Where amended regulations define any person or entity in the business of providing assistance to participants in the Federal simultaneous leasing program as one who signs, prepares, completes, or formulates applications, an entity which merely provides an applicant with parcel recommendations in the form of parcel numbers only has not "formulated" the application within the meaning of 43 CFR 3112.0-5 or 43 CFR 3112.2-4.

Ronald Valente, 87 IBLA 197 (June 14, 1985)

One who challenges a determination by the Bureau of Land Management that land is within the known geologic structure of a producing oil or gas field has the burden of showing that the determination is in error.

Ronald C. Agel, 87 IBLA 255 (June 21, 1985)

Departmental regulation 43 CFR 3111.1-1(a) requires that an over-the-counter noncompetitive oil and gas lease offer be made on a current form approved by the Director, or on unofficial copies of that form in current use. Copies must be exact reproductions on one page of both sides of the official approved form without additions, omissions, or other changes or advertising. An oil and gas lease offer is properly rejected if the two sides of the approved form are copied on separate sheets of paper.

Land determined to be within the known geological structure of a producing oil and gas field may be leased only through competitive bidding and a noncompetitive offer for such land is properly rejected. One who believes the land should no longer be included in a known geological structure and wishes to obtain a noncompetitive lease for the land must first petition for rescission of the known geological determination.

Matthew C. Mays et al., 88 IBLA 39 (July 10, 1985)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Generally--Continued

BLM may properly reject a simultaneous oil and gas lease application where the applicant failed to disclose that he received the assistance of any person or entity in the business of providing assistance to participants in the Federal stimultaneous oil and gas leasing program.

James D. Buerguel, 88 IBLA 168 (Aug. 19, 1985)

Land within a known geologic structure of a producing oil or gas field may only be leased by competitive bidding pursuant to 43 CFR Subpart 3120. A noncompetitive oil and gas lease offer filed before lands were determined to be within a known geologic structure but not accepted by the United States on the date of determination is properly rejected to the extent of inclusion of such lands.

Paul Chachula, 88 IBLA 279 (Sept. 10, 1985)

An oil and gas lease offer is properly rejected where the offer is deficient in the first year's rental by more than 10 percent.

Dorothy L. Davis, 88 IBLA 282 (Sept. 10, 1985)

A Feb. 1983 BLM decision barring an oil and gas lease applicant from further participation in simultaneous drawings pending the payment of an alleged debt was not effective during the time the applicant had to appeal and the timely filing of a notice of appeal suspended the effect of the decision. Thereafter, when the second drawee for a parcel in the Mar. 1983 drawing protests the selection of the barred applicant as first drawee, the protest is properly dismissed where the effect of the Board's ruling on the appeal was to remove the bar to participation.

Jewell Scott, Jr., 88 IBLA 307 (Sept. 17, 1985)

Under 30 U.S.C. § 226(b) (1982), lands within the known geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where lands are determined to be within such a structure after a simultaneous oil and gas lease drawing but prior to issuance of a lease, a noncompetitive lease offer for such lands must be rejected.

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of showing that the determination is in error. Where the applicant fails to show error, the determination will be upheld.

Mary Lee H. Picou, 88 IBLA 356 (Sept. 26, 1985)

Attorneys-in-Fact or Agents

Where first-drawn applicants for simultaneous oil and gas leases violate provisions of 43 CFR 3112.6-1, by failing to submit the first year's advance rental payment in the proper office within 30 days of notice to do so, and by failing to offer payment personally or through an attorney-in-fact, the offers must be rejected.

Satellite 8307193 et al., 85 IBLA 357 (Mar. 25, 1985)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Attorneys-in-Fact or Agents--Continued

Under 43 CFR 3112.2-1(b) and 43 CFR 3102.4 (1982), a simultaneous oil and gas lease application must be rendered in a manner to reveal the name of the applicant, the name of the signatory, and their relationship, where the signatory is an agent or attorney-in-fact for the applicant. Where an individual signs the application as an attorney-in-fact it will be presumed, in the absence of evidence to the contrary, that the individual is the attorney-in-fact for the applicant.

T.F.T. Partnership et al. (On Reconsideration), 88 IBLA 13 (July 1, 1985)

Description

Under 43 CFR 3101.2-3 (1980), a noncompetitive over-the-counter offer for acquired lands which included a request for less than an entire tract of acquired land was required to describe the land by course and distance between the successive angle points of the boundary of the tract sought and was further required to be accompanied by a map showing the land sought. Where an offer did not so describe the land, it could afford the offeror no priority.

John R. Chitwood III, 84 IBLA 300 (Jan. 2, 1985)

An oil and gas lease offer for surveyed land or land within a protracted survey must describe the land by legal subdivision, section, township, and range. An offer which fails to describe the land by section is defective and, therefore, properly rejected.

Isabelle C. Chang, 86 IBLA 129 (Apr. 19, 1985)

BLM is not required to alter, modify, or correct an over-the-counter oil and gas lease offer in order to provide an acceptable description of land to be entered on the offer.

John T. Bukant, 88 IBLA 51 (July 15, 1985)

Under 43 CFR 3101.1-4(a) (1981), the failure to designate a meridian is not a fatal defect in the land description in a noncompetitive oil and gas lease offer for acquired lands, where the description, on its face, uniquely delimits the land requested and BLM does not have to go outside the offer form itself to determine exactly what lands the offer describes.

Beard Oil Co., 88 IBLA 268 (Sept. 4, 1985)

The purpose of 43 CFR 3103.2-3 (1980) was to require an oil and gas lease offer or to provide a description in the offer which is sufficient on its face to delimit the lands in the offer. Where the land described is surveyed, the addition of qualifying phrases to describe subdivisions does not make the description improper. However, where excluded lands are not specifically identified in the offer, the offer will be construed to encompass all the land described.

Dorothy L. Davis, 88 IBLA 282 (Sept. 10, 1985)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Drawings

Where a decision of a state office prematurely rejects an oil and gas lease offer before the expiration of a period of time granted to the offeror to submit various documents, the rejection effectively suspends the running of the time for compliance, and where an appeal is timely taken from such a premature rejection and the documents in question are submitted during the pendency of the appeal, the submission will be considered timely.

American Petrofina Co. of Texas, 85 IBLA 104 (Feb. 14, 1985)

Where a filing service is retained to file oil and gas lease applications on behalf of a partnership and instead files four applications, each bearing the name of one partner, for the same parcel without any reference to the partnership or other parties in interest and said applications are paid for with partnership funds, the applications are partnership property. In the absence of a disclosure of the partnership's interest in such applications, 43 CFR 3102.2-7(a) (1981) has been violated. Moreover, as the holder of an interest in more than one application, the partnership has violated 43 CFR 3112.6-1 (1981) forbidding multiple filings by a partnership for the same parcel.

Christopher P. Clancy, 85 IBLA 174 (Feb. 26, 1985)

Where a simultaneous oil and gas lease application is dated prior to the commencement of the filing period and it is established that such misdating was merely inadvertent and not done with an intent to obtain a lease by fraud and that the application was signed during the filing period, the misdating is a nonsubstantive error which does not require the rejection of the application.

Satellite 8305136, 85 IBLA 190 (Feb. 27, 1985)

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 43 CFR 3120. A noncompetitive oil and gas lease offer is properly rejected where during the pendency thereof the land is determined to be within the known geologic structure of a producing oil or gas field.

Victor E. Van Duzer, 85 IBLA 235 (Mar. 4, 1985)

BLM may properly reject a simultaneous oil and gas lease application filed on behalf of an association where the applicant failed to disclose the identity of its members on Part B of the application form (Form 3112-6a (June 1981)) or a separate accompanying sheet, as required by notice published in the Federal Register in accordance with 43 CFR 3102.5 (1983).

Turner Ass'n, 85 IBLA 374 (Mar. 26, 1985)

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 43 CFR 3120. A noncompetitive oil and gas lease offer is properly rejected where during the pendency thereof the land is determined to be within the known geologic structure of a producing oil or gas field. The drawing of an application for a noncompetitive oil and gas lease creates no vested rights in the applicant; it

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Drawings--Continued

only establishes the priority to be accorded conflicting applications.

John P. Brogan, 85 IBLA 379 (Mar. 26, 1985)

BLM may properly reject a first-drawn application in a simultaneous oil and gas lease drawing where the applicant has made reference to its qualifications file number, but has not complied with the requirements of 43 CFR 3102.5 as incorporated in 43 CFR 3112.2-3, which, together, require that the names of all parties in interest be stated on the application or on a sheet accompanying the application.

W.O.I.L. Associates, 85 IBLA 394 (Mar. 28, 1985)

Failure of an applicant to date a simultaneous oil and gas lease application in accordance with 43 CFR 3112.2-1(c) (1982) does not require rejection of the application, where it is shown that the application was in fact signed during the filing period.

Ruth C. Fezirian, 86 IBLA 29 (Apr. 3, 1985)

BLM may properly reject a simultaneous oil and gas lease application where the applicant failed to disclose on Part B of his application form (Form 3112-6a (June 1981)) the identity of the filing service which assisted him in filing the application, in accordance with 43 CFR 3112.2-4. Failure to disclose will be treated as a substantive defect.

Carl S. Matuszek, O. M. Holley, 86 IBLA 124 (Apr. 16, 1985)

BLM may properly reject a simultaneous oil and gas lease application where the applicant failed to disclose that he received the assistance of any person or entity in the business of providing assistance to participants in the Federal simultaneous oil and gas leasing program.

John G. O'Leary, 86 IBLA 131 (Apr. 22, 1985)

Where an applicant gained first priority in a drawing, but issuance of a noncompetitive lease was delayed, first by litigation and subsequently by a Secretarial order, and during the interim part of the land in that parcel was designated as within the known geologic structure of a producing oil or gas field, the application was properly rejected as to the land so designated.

Marc W. Richman, 86 IBLA 143 (Apr. 23, 1985)

An automated simultaneous oil and gas lease application Part B, form 3112-6a, which is unsigned is properly found to be unacceptable.

Satellite 83C9220, 87 IBLA 93 (May 30, 1985)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Drawings--Continued

If the identity of the holder of an interest in an oil and gas lease application is not disclosed on the application form, the application must be rejected for failure to disclose a party in interest. If a person has an interest in more than one application filed for the same parcel, the application must be rejected as constituting a prohibited multiple filing.

"Interest in an oil and gas lease or offer." Where an applicant for an oil and gas lease has executed a note entitling the holder to 60 percent of the proceeds from a Federal oil and gas lease, the holder of the note has an interest in the oil and gas lease pursuant to 43 CFR 3100.0-5(b) (1982).

Joshua Basin Partnership, Taylor Basin Partnership, Shasta Basin Partnership, Mesozoic-Paleozoic Joint Venture, 87 IBLA 179 (June 13, 1985)

Under 43 CFR 3112.2-1(b) and 43 CFR 3102.4 (1982), a simultaneous oil and gas lease application must be rendered in a manner to reveal the name of the applicant, the name of the signatory, and their relationship, where the signatory is an agent or attorney-in-fact for the applicant. Where an individual signs the application as an attorney-in-fact it will be presumed, in the absence of evidence to the contrary, that the individual is the attorney-in-fact for the applicant.

T.E.T. Partnership et al. (On Reconsideration), 88 IBLA 13 (July 1, 1985)

BLM may properly reject a simultaneous oil and gas lease application where the applicant failed to disclose that he received the assistance of any person or entity in the business of providing assistance to participants in the Federal stimultaneous oil and gas leasing program.

James D. Buergel, 88 IBLA 168 (Aug. 19, 1985)

Filing

Prior to the July 23, 1983, amendment to 43 CFR 3110.2 (1983), which prohibited the withdrawal of an application filed under the automated simultaneous oil and gas leasing system, an application could be withdrawn provided the withdrawal was in writing and was received by BLM prior to the close of the filing period.

Where an applicant for a simultaneous oil and gas lease fails to designate a state prefix on the automated application form, such application is properly deemed unacceptable under 43 CFR 3112.3(a) (1983), and the applicant is properly assessed a service charge of $75 per application form and all other filing fees are returned.

Denver Resources, Inc., 84 IBLA 327 (Jan. 8, 1985)

BLM may properly reject an acquired lands noncompetitive oil and gas lease offer filed for public domain lands.

Sam O. McReynolds, 85 IBLA 36 (Jan. 31, 1985)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Filing--Continued

Where a filing service is retained to file oil and gas lease applications on behalf of a partnership and instead files four applications, each bearing the name of one partner, for the same parcel without any reference to the partnership or other parties in interest and said applications are paid for with partnership funds, the applications are partnership property. In the absence of a disclosure of the partnership's interest in such applications, 43 CFR 3102.2-7(a) (1981) has been violated. Moreover, as the holder of an interest in more than one application, the partnership has violated 43 CFR 3112.6-1 (1981) forbidding multiple filings by a partnership for the same parcel.

Christopher F. Clancy, 85 IBLA 174 (Feb. 26, 1985)

Where a simultaneous oil and gas lease application is dated prior to the commencement of the filing period and it is established that such misdating was merely inadvertent and not done with an intent to obtain a lease by fraud and that the application was signed during the filing period, the misdating is a nonsubstantive error which does not require the rejection of the application.

Satellite 83C5136, 85 IBLA 190 (Feb. 27, 1985)

Where first-drawn applicants for simultaneous oil and gas leases violate provisions of 43 CFR 3112.6-1, by failing to submit the first year's advance rental payment in the proper office within 30 days of notice to do so, and by failing to offer payment personally or through an attorney-in-fact, the offers must be rejected.

Satellite 8307193 et al., 85 IBLA 357 (Mar. 25, 1985)

An automated simultaneous oil and gas lease application Part E, form 3112-6a, which is unsigned is properly found to be unacceptable.

Satellite 83C9220, 87 IBLA 93 (May 30, 1985)

Where amended regulations define any person or entity in the business of providing assistance to participants in the Federal simultaneous leasing program as one who signs, prepares, completes, or formulates applications, an entity which merely provides an applicant with parcel recommendations in the form of parcel numbers only has not "formulated" the application within the meaning of 43 CFR 3112.0-5 or 43 CFR 3112.2-4.

Ronald Valmonte, 87 IBLA 197 (June 14, 1985)

Under 43 CFR 3112.2-1(b) and 43 CFR 3102.4 (1982), a simultaneous oil and gas lease application must be rendered in a manner to reveal the name of the applicant, the name of the signatory, and their relationship, where the signatory is an agent or attorney-in-fact for the applicant. Where an individual signs the application as an attorney-in-fact it will be presumed, in the absence of evidence to the contrary, that the individual is the attorney-in-fact for the applicant.

T.E.T. Partnership et al. (On Reconsideration), 88 IBLA 13 (July 1, 1985)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Filing--Continued

Departmental regulation 43 CFR 3111.1-1(a) requires that an over-the-counter noncompetitive oil and gas lease offer be made on a current form approved by the Director, or on unofficial copies of that form in current use. Copies must be exact reproductions on one page of both sides of the official approved form without additions, omissions, or other changes or advertising. An oil and gas lease offer is properly rejected if the two sides of the approved form are copied on separate sheets of paper.

Matthew C. Mays et al., 88 IBLA 39 (July 10, 1985)

Where BLM mails a notice to the first-drawn applicant in a simultaneous oil and gas lease drawing requiring the applicant to execute a lease offer and tender the first year's rental in accordance with 43 CFR 3112.6-1(a), the failure to return the rental payment and executed lease offer within the 30-day period properly results in rejection of the offer. The offeror's absence from his address of record when the notice was received at that address will not excuse noncompliance with 43 CFR 3112.6-1.

Richard L. Knowles, 88 IBLA 120 (Aug. 1, 1985)

Where BLM mails a notice to the first-drawn applicant in a simultaneous oil and gas lease drawing requiring the applicant to execute a lease offer and to tender the first year's rental in accordance with 43 CFR 3112.6-1(a), the failure to return the rental payment and executed lease offer within the 30-day period properly results in rejection of the offer.

Lottery Risk BO, Ltd., 88 IBLA 160 (Aug. 15, 1985)

A Feb. 1983 BLM decision barring an oil and gas lease applicant from further participation in simultaneous drawings pending the payment of an alleged debt was not effective during the time the applicant had to appeal and the timely filing of a notice of appeal suspended the effect of the decision. Thereafter, when the second drawee for a parcel in the Mar. 1983 drawing protests the selection of the barred applicant as first drawee, the protest is properly dismissed where the effect of the Board's ruling on the appeal was to remove the bar to participation.

Jewell Scott, Jr., 88 IBLA 307 (Sept. 17, 1985)

Sole Party in Interest

Where a filing service is retained to file oil and gas lease applications on behalf of a parnership and d instead files four applications, each bearing the name of one partner, for the same parcel without any reference to the partnership or other parties in interest and said applications are paid for with partnership funds, the applications are partnership property. In the absence of a disclosure of the partnership's interest in such applications, 43 CFR 3102.2-7(a) (1981) has been violated. Moreover, as the holder of an interest in more than one application, the partnership has violated 43 CFR 3112.6-1 (1981) forbidding multiple filings by a partnership for the same parcel.

Christopher F. Clancy, 85 IBLA 174 (Feb. 26, 198[illegible])

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Sole Party in Interest--Continued

If the identity of the holder of an interest in an oil and gas lease application is not disclosed on the application form, the application must be rejected for failure to disclose a party in interest. If a person has an interest in more than one application filed for the same parcel, the application must be rejected as constituting a prohibited multiple filing.

"Interest in an oil and gas lease or offer." Where an applicant for an oil and gas lease has executed a note entitling the holder to 60 percent of the proceeds from a Federal oil and gas lease, the holder of the note has an interest in the oil and gas lease pursuant to 43 CFR 3100.0-5(b) (1982).

Joshua Basin Partnership, Taylor Basin Partnership, Shasta Basin Partnership, Mesozoic-Paleozoic Joint Venture, 87 IBLA 179 (June 13, 1985)

ASSIGNMENTS OR TRANSFERS

Under 30 U.S.C. § 188(c) (1982), the Secretary is without authority to reinstate an oil and gas lease terminated by operation of law for failure to pay annual rental timely where the lessee fails to submit the full amount of rental due within 20 days of the anniversary date of the lease.

Where the assignment of an oil and gas lease is pending before the Bureau of Land Management, the assignor is responsible for the performance of all obligations under the lease until the assignment has been approved. The failure of the Bureau of Land Management to approve an assignment by the rental due date does not excuse or justify the nonpayment or late payment of the rental.

Jerry D. Powers, 85 IBLA 116 (Feb. 15, 1985)

Under 30 U.S.C. § 188(c) (1982), the Department has no authority to reinstate an oil and gas lease terminated by operation of law for failure to pay annual rental timely where the lessee fails to submit the full amount of rental due within 20 days of the anniversary date of the lease.

Where a proposed assignment of an oil and gas lease has not been approved by BLM and the lease has automatically terminated by operation of law for failure to pay rental timely, only the original lessee as holder of record of the lease, and not the potential assignee, may petition to have the lease reinstated pursuant to 43 U.S.C. § 188(c) (1982).

Otto C. Svancara, Grete Svancara, 87 IBLA 319 (June 25, 1985)

A BLM decision requesting a new bond for an oil and gas lease prior to approval of assignment of the lease will be upheld where the assignee disputes the amount of the required bond but fails to establish error in BLM's determination of the bond amount.

Forest Gray, 88 IBLA 64 (July 22, 1985)

BONA FIDE PURCHASER

The protection afforded by 30 U.S.C. § 184(h)(2) (1982) to a bona fide purchaser of an oil or gas lease which issued noncompetitively applies only where the predecessors-in-interest were in violation of some provision of the Act, such as the acreage limitations. It

OIL AND GAS LEASES--Continued

BONA FIDE PURCHASER--Continued

does not apply where the lease was erroneously issued for lands not subject to noncompetitive leasing.

Where the assignee of an oil and gas lease is chargeable with actual or constructive knowledge of the fact that the lease improperly issued, the assignee may not assert bona fide purchaser status pursuant to 30 U.S.C. § 184(h)(2) (1982).

Lee Oil Properties, Inc., et al., 85 IBLA 287 (Mar. 13, 1985)

BONDS

A BLM decision requesting a new bond for an oil and gas lease prior to approval of assignment of the lease will be upheld where the assignee disputes the amount of the required bond but fails to establish error in BLM's determination of the bond amount.

Forest Gray, 88 IBLA 64 (July 22, 1985)

CANCELLATION

The protection afforded by 30 U.S.C. § 184(h)(2) (1982) to a bona fide purchaser of an oil or gas lease which issued noncompetitively applies only where the predecessors-in-interest were in violation of some provision of the Act, such as the acreage limitations. It does not apply where the lease was erroneously issued for lands not subject to noncompetitive leasing.

Where the assignee of an oil and gas lease is chargeable with actual or constructive knowledge of the fact that the lease improperly issued, the assignee may not assert bona fide purchaser status pursuant to 30 U.S.C. § 184(h)(2) (1982).

Where it is shown that an oil and gas lease which improperly issued embraces lands presently known to contain valuable deposits of oil or gas, the Department may not, consistent with 43 CFR 3108.3(e), administratively cancel such lease, but, rather, must commence suit in Federal court to obtain a judicial cancellation of the lease.

Lee Oil Properties, Inc., et al., 85 IBLA 287 (Mar. 13, 1985)

The Secretary of the Interior has the authority to cancel any oil and gas lease issued contrary to law because of the inadvertence of his subordinates.

Where an oil and gas lease has inadvertently been issued for land that was the subject of a then current lease in good standing, the later lease is properly canceled to the extent that it conflicts with the earlier lease.

L & B Land Lease Group 82-3, 88 IBLA 221 (Aug. 28, 1985)

CIVIL ASSESSMENTS AND PENALTIES

When the Bureau of Land Management cites an oil and gas lessee for an incident of noncompliance for a safety violation, the failure to have a belt guard on a pumpjack, the Bureau of Land Management may not assess the lessee a penalty for noncompliance if the lessee, acting in good faith, has complied timely with the terms of the order and if the purpose of the order, ensuring safety, has been fulfilled. No penalty will

OIL AND GAS LEASES--Continued

CIVIL ASSESSMENTS AND PENALTIES--Continued

be imposed where the cited "hazard" is so minimal that the risk of actual harm is virtually nonexistent.

Chincok Resources, Inc., 85 IBLA 5 (Jan. 30, 1985)

Where an oil and gas operator is assessed a penalty for failure to obtain approval from the Bureau of Land Management under 43 CFR 3162.3-3 prior to constructing a flowline in connection with an oil and gas well, but the penalty is assessed under a subsection of the regulations which deals with an entirely different regulation, and it appears that there is no assessment prescribed for violation of 43 CFR 3162.3-3, the decision will be reversed.

Wintershall Oil & Gas Corp., 85 IBLA 101 (Feb. 14, 1985)

Failure to have more than one valve effectively sealed, as required by 43 CFR 3162.7-4(b)(1), requires an assessment of $250 for each unsealed valve, in accordance with 43 CFR 3163.3(j), because each failure is a specific instance of noncompliance.

Farmers Union Central Exchange, Inc., 87 IBLA 332 (June 26, 1985) 92 I.D. 281

COMPETITIVE LEASES

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale where the record discloses a rational basis for the conclusion that the amount of the bid was inadequate. The explanation provided must inform the bidder of the factual basis of the decision and must be sufficient for the Board to determine the correctness of the decision if disputed on appeal.

Where a competitive oil and gas lease high bid is not clearly spurious or unreasonable on its face and the record fails to disclose a sufficient factual basis for the conclusion that the bid is inadequate, the decision will be set aside and the case remanded for compilation of a more complete record and readjudication of the bid.

Exxon Co., U.S.A., 85 IBLA 135 (Feb. 19, 1985)

Michael Shearn, 87 IBLA 168 (June 13, 1985)

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale where the record discloses a rational basis for the conclusion that the amount of the bid was inadequate. The explanation provided must inform the bidder of the factual basis of the decision and must be sufficient for the Board to determine the correctness of the decision if disputed on appeal.

The Department is entitled to rely on the reasoned analysis of its technical experts in matters concerning geologic evaluation of tracts of land offered at a sale of competitive oil and gas leases. Where a decision to reject a bid has been made in a careful and systematic manner utilizing the advice of such experts, the decision will not be reversed, even though the determination may be subject to reasonable differences of opinion, where an appellant fails to meet its affirmative obligation to establish that its bid is a reasonable reflection of fair market value.

Dan Nelson, 85 IBLA 156 (Feb. 25, 1985)

OIL AND GAS LEASES--Continued

COMPETITIVE LEASES--Continued

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale where the record discloses a rational basis for the conclusion that the amount of the bid was inadequate. The explanation provided must inform the bidder of the factual basis of the decision and must be sufficient for the Board to determine the correctness of the decision if disputed on appeal.

Where a competitive oil and gas lease high bid is not clearly spurious or unreasonable on its face and the record fails to disclose a sufficient factual basis for the conclusion that the bid is inadequate, the decision will be set aside and the case remanded for compilation of a more complete record and readjudication of the bid.

When the Government rejects a competitive oil and gas lease high bid because it was less than the presale tract valuation, the bidder must not only disprove the Government's fair market estimates, but must also prove that his bids constitute fair market value. However, appellant does not bear this burden until after the Government has established a prima facie case supporting its estimates.

Burton/Hawks, Inc., 85 IBLA 193 (Feb. 27, 1985)

Where production is had under a state spacing order which would be attributable on a pro rata basis to Federal mineral interests within the spacing unit, such production prima facie establishes that the Federal land is within a known geologic structure of a producing oil and gas field, even where the United States has not consented to the communitization of the Federal interests pursuant to the state spacing order.

Lee Oil Properties, Inc., et al., 85 IBLA 287 (Mar. 13, 1985)

The requirement that a bidder in a competitive oil and gas lease sale must submit one-fifth of the bid amount with his bid is mandatory and will not be waived.

Dolton H. Simmons, 85 IBLA 297 (Mar. 13, 1985)

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale where the record discloses a rational basis for the conclusion that the amount of the bid was inadequate. The explanation provided must inform the bidder of the factual basis of the decision and must be sufficient for the Board to determine the correctness of the decision if disputed on appeal.

The Department is entitled to rely on the reasoned analysis of its technical experts in matters concerning geologic evaluation of tracts of land offered at a sale of competitive oil and gas leases. Where a decision to reject a bid has been made in a careful and systematic manner utilizing the advice of such experts, the decision will not be reversed, even though the determination may be subject to reasonable differences of opinion, where an appellant fails to meet his affirmative obligation to establish that his bid is a reasonable reflection of fair market value.

Howell Spear, 86 IBLA 8 (Mar. 29, 1985)

OIL AND GAS LEASES--Continued

COMPETITIVE LEASES--Continued

Where a competitive oil and gas lease high bid is not clearly spurious or unreasonable on its face and the record fails to reveal sufficient data in support of the decision to reject such bid, the decision will be set aside and the case remanded for compilation of a more complete record and readjudication of the bid.

Suzanne Walsh, 86 IBLA 83 (Apr. 11, 1985)

Where a competitive oil and gas lease high bid is not clearly spurious or unreasonable on its face and the record fails to disclose a sufficient factual basis for the conclusion that the bid is inadequate, the decision will be set aside and the case remanded for compilation of a more complete record and readjudication of the bid. A record that does not reveal the estimated minimum acceptable value for a parcel and sufficient factual data to establish its prima facie correctness cannot support rejection of the high bid for the parcel.

Yates Petroleum Corp., 86 IBLA 252 (May 2, 1985)

The rejection of the high bid for an oil and gas lease offered at a competitive lease sale will be affirmed where the administrative record shows that the much higher value of the parcel set by BLM was the product of careful and reasoned analysis, and appellant neither demonstrates error in BLM's appraisal nor establishes that his bid accurately reflects the actual fair market value.

J. W. McTiernan, 87 IBLA 76 (May 28, 1985)

Where a decision to reject a competitive oil and gas lease sale high bid has been made in a careful and systematic manner utilizing the advice of Departmental experts and the record discloses a rational basis for the conclusion that the bid is inadequate, such a decision will not be overturned on appeal.

Petrovest, Inc., 88 IBLA 166 (Aug. 19, 1985)

CONSENT OF AGENCY

The Mineral Leasing Act for Acquired Lands, as amended, 30 U.S.C. § 351 (1982), requires that the consent of the administrative agency having jurisdiction over acquired land described in a lease offer be obtained prior to the issuance of a lease for such land. Where the Corps of Engineers does not consent to lease because its research testing could be affected by a drilling operation, the Department of the Interior is without authority to lease.

Sam P. Jones (On Judicial Remand), 84 IBLA 331 (Jan. 11, 1985)

While the general Departmental policy is not to suspend oil and gas lease offers to await possible future leasing of lands, the policy is not without exception. Where circumstances warrant suspension and suspension is not precluded by 43 CFR 2091.1, oil and gas lease offers for acquired lands in the Nueces River Project under the jurisdiction of the Bureau of Reclamation may be suspended until the Bureau of Reclamation has completed its oil and gas management plan for that area.

Dinero Oil Corp., 84 IBLA 394 (Jan. 28, 1985)

OIL AND GAS LEASES--Continued

CONSENT OF AGENCY--Continued

The Mineral Leasing Act for Acquired Lands of 1947, as amended, 30 U.S.C. §§ 351-359 (1982), requires that the consent of the administrative agency having jurisdiction over acquired land described in a lease application be obtained prior to the issuance of a lease for such land. Absent consent, the Department of the Interior is without authority to issue a lease.

Beard Oil Co., 88 IBLA 268 (Sept. 4, 1985)

DESCRIPTION OF LAND

A noncompetitive oil and gas lease offer for acquired land not within the area of the public land surveys may properly describe the land in the offer by metes and bounds giving the course and distance between successive angle points on the boundary of the tract.

An oil and gas lease offer is considered to be an offer to lease any and all lands described therein. The fact that part of a tract of land described in an oil and gas lease offer is unavailable for leasing does not ordinarily require rejection of the entire lease offer.

Bruce Anderson, 85 IBLA 270 (Mar. 6, 1985)

An oil and gas lease offer for surveyed land or land within a protracted survey must describe the land by legal subdivision, section, township, and range. An offer which fails to describe the land by section is defective and, therefore, properly rejected.

Isabelle C. Chang, 86 IBLA 129 (Apr. 19, 1985)

BLM is not required to alter, modify, or correct an over-the-counter oil and gas lease offer in order to provide an acceptable description of land to be entered on the offer.

John T. Bukant, 88 IBLA 51 (July 15, 1985)

Under 43 CFR 3101.1-4(a) (1981), the failure to designate a meridian is not a fatal defect in the land description in a noncompetitive oil and gas lease offer for acquired lands, where the description, on its face, uniquely delimits the land requested and BLM does not have to go outside the offer form itself to determine exactly what lands the offer describes.

Beard Oil Co., 88 IBLA 268 (Sept. 4, 1985)

DISCRETION TO LEASE

While the general Departmental policy is not to suspend oil and gas lease offers to await possible future leasing of lands, the policy is not without exception. Where circumstances warrant suspension and suspension is not precluded by 43 CFR 2091.1, oil and gas lease offers for acquired lands in the Nueces River Project under the jurisdiction of the Bureau of Reclamation may be suspended until the Bureau of Reclamation has completed its oil and gas management plan for that area.

Dinero Oil Corp., 84 IBLA 394 (Jan. 28, 1985)

OIL AND GAS LEASES--Continued

DISCRETION TO LEASE--Continued

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale where the record discloses a rational basis for the conclusion that the amount of the bid was inadequate. The explanation provided must inform the bidder of the factual basis of the decision and must be sufficient for the Board to determine the correctness of the decision if disputed on appeal.

Where a competitive oil and gas lease high bid is not clearly spurious or unreasonable on its face and the record fails to disclose a sufficient factual basis for the conclusion that the bid is inadequate, the decision will be set aside and the case remanded for compilation of a more complete record and readjudication of the bid.

Exxon Co., U.S.A., 85 IBLA 135 (Feb. 19, 1985)

Burton/Hawks, Inc., 85 IBLA 193 (Feb. 27, 1985)

Michael Shearn, 87 IBLA 168 (June 13, 1985)

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale where the record discloses a rational basis for the conclusion that the amount of the bid was inadequate. The explanation provided must inform the bidder of the factual basis of the decision and must be sufficient for the Board to determine the correctness of the decision if disputed on appeal.

The Department is entitled to rely on the reasoned analysis of its technical experts in matters concerning geologic evaluation of tracts of land offered at a sale of competitive oil and gas leases. Where a decision to reject a bid has been made in a careful and systematic manner utilizing the advice of such experts, the decision will not be reversed, even though the determination may be subject to reasonable differences of opinion, where an appellant fails to meet its affirmative obligation to establish that its bid is a reasonable reflection of fair market value.

Dan Nelson, 85 IBLA 156 (Feb. 25, 1985)

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale where the record discloses a rational basis for the conclusion that the amount of the bid was inadequate. The explanation provided must inform the bidder of the factual basis of the decision and must be sufficient for the Board to determine the correctness of the decision if disputed on appeal.

The Department is entitled to rely on the reasoned analysis of its technical experts in matters concerning geologic evaluation of tracts of land offered at a sale of competitive oil and gas leases. Where a decision to reject a bid has been made in a careful and systematic manner utilizing the advice of such experts, the decision will not be reversed, even though the determination may be subject to reasonable differences of opinion, where an appellant fails to meet his affirmative obligation to establish that his bid is a reasonable reflection of fair market value.

Howell Spear, 86 IBLA 8 (Mar. 29, 1985)

Where a competitive oil and gas lease high bid is not clearly spurious or unreasonable on its face and the record fails to reveal sufficient data in support of the decision to reject such bid, the decision will

OIL AND GAS LEASES--Continued

DISCRETION TO LEASE--Continued

be set aside and the case remanded for compilation of a more complete record and readjudication of the bid.

Suzanne Walsh, 86 IBLA 83 (Apr. 11, 1985)

The statutory withdrawal pursuant to the Act of Sept. 19, 1914, 38 Stat. 714, of certain lands from location, entry, or appropriation under the public land and mineral laws does not constitute a per se withdrawal from mineral leasing. Leases issued pursuant to the subsequently enacted Mineral Leasing Act of 1920, 30 U.S.C. §§ 181-287 (1982), are generally not considered to constitute a location, entry, or appropriation of the public lands embraced therein as these terms refer to acts by which a claim of title to the land is initiated.

Douglas H. Willson, W. G. Boonenberg, 86 IBLA 135 (Apr. 22, 1985) 92 I.D. 153

Where a competitive oil and gas lease high bid is not clearly spurious or unreasonable on its face and the record fails to disclose a sufficient factual basis for the conclusion that the bid is inadequate, the decision will be set aside and the case remanded for compilation of a more complete record and readjudication of the bid. A record that does not reveal the estimated minimum acceptable value for a parcel and sufficient factual data to establish its prima facie correctness cannot support rejection of the high bid for the parcel.

Yates Petroleum Corp., 86 IBLA 252 (May 2, 1985)

The rejection of the high bid for an oil and gas lease offered at a competitive lease sale will be affirmed where the administrative record shows that the much higher value of the parcel set by BLM was the product of careful and reasoned analysis, and appellant neither demonstrates error in BLM's appraisal nor establishes that his bid accurately reflects the actual fair market value.

J. W. McTiernan, 87 IBLA 76 (May 28, 1985)

Where a decision to reject a competitive oil and gas lease sale high bid has been made in a careful and systematic manner utilizing the advice of Departmental experts and the record discloses a rational basis for the conclusion that the bid is inadequate, such a decision will not be overturned on appeal.

Petrovest, Inc., 88 IBLA 166 (Aug. 19, 1985)

DRILLING

Where a blizzard prevented a drilling rig from reaching a drill site in time to begin operations before the Nov. 30 expiration date of the lease, and a lease suspension was therefor granted effective Nov. 1, to "terminate automatically on the first of the month in which actual approved drilling operations are commenced," and such operations were commenced on Dec. 7, the new expiration date of the initial lease term was Dec. 31. Because the resultant dry hole was drilled, finished, plugged, and abandoned by Dec. 25, no drilling operations were in progress at the close of

OIL AND GAS LEASES--Continued

DRILLING--Continued

Dec. 31, and the lease expired. The drilling operations previously concluded did not qualify the lease for a 2-year extension.

Milestone Petroleum, Inc., Phillips Oil Co., 85 IBLA 96 (Feb. 14, 1985)

Approval of an application for a permit to drill has been identified by the Department as an action categorically excluded from the provisions of the National Environmental Policy Act requiring preparation of an environmental assessment (EA) or environmental impact statement (EIS). However, in exceptional circumstances approval of an application for a permit to drill raises sufficient concern to warrant the preparation of an EA. An EA is proper when there is reason to believe the proposed action might pose a threat to a threatened or endangered species.

A determination that a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination is reasonable. The party challenging a determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

The proximity of the proposed action to national park lands is a material factor to be considered in the analysis of the intensity or severity of the impact of the proposed action on the human environment. When the official having responsibility for managing parklands near the site of the proposed action expresses an opinion that the proposed action may or will adversely affect the park ecosystem, that opinion should be afforded substantial weight in the EA.

The degree to which the proposed action may be considered as highly controversial is a material factor to be considered in the analysis of the intensity or severity of the impact of the proposed action on the human environment. However, the mere fact that persons or organizations oppose the proposed action does not per se render the action "highly controversial," as the term properly refers to cases where a substantial dispute exists as to the size, nature, or effect of the action. Even when certain aspects of a proposed action may be deemed highly controversial, an EIS need not be prepared if the effects giving rise to the controversy have been adequately mitigated.

Connected action must be considered to be a part of the proposed action when determining whether a proposed action will have a significant effect on the human environment. Connected actions include those which: (i) automatically trigger other actions which may require an EIS; (ii) cannot or will not proceed unless other actions are undertaken previously or simultaneously; or (iii) are interdependent parts of a larger action and depend on the larger action for their justification.

When making a determination whether a proposed action will have a significant effect on the human environment, the cumulative effect of the proposed action and other actions not connected with the proposed action must be taken into consideration, even though, individually, the actions may be deemed insignificant. However, the possible impact of a speculative future action need not be considered when it can reasonably be assumed that such future action will not take place, or, if it will take place, an EA

OIL AND GAS LEASES--Continued

DRILLING--Continued

will be completed prior to a decision to take such action.

The adverse effects of a proposed action may be reduced to a point where they no longer have a significant impact upon the human environment by the implementation of mitigating measures. However, the agency imposing such additional requirements deemed necessary to mitigate the adverse effect of the proposed action must have the authority to enforce compliance with the mitigating measures imposed.

When it has been determined a proposed action is located in an area occupied by a species identified as being threatened or endangered, the Department is required by 16 U.S.C. § 1536(a)(2) (1982) to assure any action authorized by it is not likely to jeopardize the continued existence of the threatened or endangered species, or result in the adverse modification of the critical habitat of such species, or seek an exemption pursuant to 16 U.S.C. § 1536(h) (1982). If a determination that approval of an application for a permit to drill an oil and gas well will result in "no jeopardy" is based upon the implementation of certain mitigating measures, the application for permission to drill may be approved only after it has been determined that the mitigating measures can be imposed upon necessary parties.

When a finding that no significant impact will result from construction of a road to a drillsite is critically dependent upon the location of that road along a route avoiding critical habitat of a threatened or endangered species, a stipulation to the application for a permit to drill allowing the road to be relocated to avoid destruction of a cultural resource value is in conflict with the basis for determination that no significant impact will occur. The cultural resource stipulation must be amended to prohibit relocation of the road or require a supplemental EA prior to relocating the road.

Glacier-Two Medicine Alliance et al., 88 IBLA 133 (Aug. 9, 1985)

EXPIRATION

Where a blizzard prevented a drilling rig from reaching a drill site in time to begin operations before the Nov. 30 expiration date of the lease, and a lease suspension was therefor granted effective Nov. 1, to "terminate automatically on the first of the month in which actual approved drilling operations are commenced," and such operations were commenced on Dec. 7, the new expiration date of the initial lease term was Dec. 31. Because the resultant dry hole was drilled, finished, plugged, and abandoned by Dec. 25, no drilling operations were in progress at the close of Dec. 31, and the lease expired. The drilling operations previously concluded did not qualify the lease for a 2-year extension.

Milestone Petroleum, Inc., Phillips Oil Co., 85 IBLA 96 (Feb. 14, 1985)

EXTENSIONS

Where a blizzard prevented a drilling rig from reaching a drill site in time to begin operations before the Nov. 30 expiration date of the lease, and a lease suspension was therefor granted effective Nov. 1, to "terminate automatically on the first of the month in which actual approved drilling operations are commenced," and such operations were commenced on Dec. 7, the new expiration date of the initial lease term was Dec. 31. Because the resultant dry hole was drilled, finished, plugged, and abandoned by Dec. 25, no drilling operations were in progress at the close of

OIL AND GAS LEASES--Continued

EXTENSIONS--Continued

Dec. 31, and the lease expired. The drilling operations previously concluded did not qualify the lease for a 2-year extension.

Milestone Petroleum, Inc., Phillips Oil Co., 85 IBLA 96 (Feb. 14, 1985)

Where the record shows that at the end of the primary term of an oil and gas lease, there is no production of oil or gas in paying quantities from the lease area, and no well capable of such production, the lease expires at the end of its term in the absence of diligent drilling operations initiated prior to the expiration or suspension of the lease.

The partial commitment of lands within an oil and gas lease to a unit agreement segregates the land in the lease into separate leases embracing those lands committed to the unit and those lands not unitized. The lease committed to the unit continues in effect for so long as committed, provided that production is obtained within the unit prior to expiration of the term of the lease.

American Resource Management Corp. (On Judicial Remand), 88 IBLA 172 (Aug. 20, 1985)

FIRST-QUALIFIED APPLICANT

In the absence of a proper receptacle for the receipt outside of established business hours of personally delivered filings, it was not improper for a BLM employee, prior to the opening of the BLM office, to receive acquired lands oil and gas lease offers in the hallway of the BLM office on the condition that they would be time and date stamped as of the opening of the office. An individual who voluntarily declined to submit his offer at that time cannot be heard later to claim unfair treatment and protest loss of priority because the offer presented by him was machine time stamped 1 minute after the opening of the office.

Harris-Headrick, 85 IBLA 48 (Feb. 6, 1985)

Failure of an applicant to date a simultaneous oil and gas lease application in accordance with 43 CFR 3112.2-1(c) (1982) does not require rejection of the application, where it is shown that the application was in fact signed during the filing period.

Ruth C. Bezirjum, 86 IBLA 29 (Apr. 3, 1985)

FUTURE AND FRACTIONAL INTEREST LEASES

An application for a noncompetitive future interest oil and gas lease is properly rejected where the land applied for is known to contain mineral deposits or is within the known geologic structure of a producing oil or gas field.

Edgar W. White, 85 IBLA 161 (Feb. 25, 1985)

KNOWN GEOLOGIC STRUCTURE

Under 30 U.S.C. § 226(b) (1982), lands within the known geological structure of a producing oil or gas field may be leased only by competitive bidding. Where lands are determined to be within such a structure after a simultaneous oil and gas lease

OIL AND GAS LEASES--Continued

KNOWN GEOLOGIC STRUCTURE--Continued

drawing but prior to issuance of a lease, a lease offer for such lands must be rejected. The offeror has no vested rights to issuance of a lease.

Where BLM rejects a noncompetitive oil and gas lease offer on the grounds the parcel sought to be leased lies within a known geologic structure, in the absence of supporting geological data in the record on appeal, a challenge to the determination requires the decision be set aside as unsupported in fact.

Carolyn J. McCutchin, 84 IBLA 368 (Jan. 24, 1985)

Under 30 U.S.C. § 226(b) (1982), lands within the known geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where lands are determined to be within such a structure after a simultaneous oil and gas lease drawing but prior to issuance of a lease, a simultaneous oil and gas lease application for such lands must be rejected. The applicant has no vested rights to issuance of a lease.

An applicant for a simultaneous oil and gas lease who challenges a determination by BLM that land is within the known geologic structure of a producing oil or gas field has the burden of showing that the determination is in error.

R. K. O'Connell, 85 IBLA 29 (Jan. 30, 1985)

Pursuant to 30 U.S.C. § 226(b) (1982), lands within the geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where the lands are determined to be within a known geologic structure prior to issuance of a lease, a simultaneous oil and gas lease offer for such lands must be rejected.

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of establishing that the determination is in error. The determination will not be disturbed in the absence of a clear and definite showing of error.

Evelyn D. Ruckstuhl, 85 IBLA 69 (Feb. 11, 1985)

Lands within a known geologic structure of a producing oil or gas field may only be leased by competitive bidding pursuant to 43 CFR 3120. A noncompetitive oil and gas lease offer filed before the lands were determined to be within a known geologic structure but not accepted by the United States on the date of determination is properly rejected.

V. H. Jernigan, 85 IBLA 138 (Feb. 20, 1985)

An application for a noncompetitive future interest oil and gas lease is properly rejected where the land applied for is known to contain mineral deposits or is within the known geologic structure of a producing oil or gas field.

Edgar W. White, 85 IBLA 161 (Feb. 25, 1985)

OIL AND GAS LEASES--Continued

KNOWN GEOLOGIC STRUCTURE--Continued

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 43 CFR 3120. A noncompetitive oil and gas lease offer is properly rejected where during the pendency thereof the land is determined to be within the known geologic structure of a producing oil or gas field.

Victor E. Van Duzer, 85 IBLA 235 (Mar. 4, 1985)

Where production is had under a state spacing order which would be attributable on a pro rata basis to Federal mineral interests within the spacing unit, such production prima facie establishes that the Federal land is within a known geologic structure of a producing oil and gas field, even where the United States has not consented to the communitization of the Federal interests pursuant to the state spacing order.

Lee Oil Properties, Inc., et al., 85 IBLA 287 (Mar. 13, 1985)

Under 30 U.S.C. § 226(b) (1982) land within the known geologic structure of a producing oil or gas field may only be leased by competitive bidding, and where land is determined to be within such a structure while a noncompetitive lease offer is pending, the offer must be rejected.

An applicant for a noncompetitive oil and gas lease who challenges a determination by the Geological Survey that land is within the known geologic structure of a producing oil or gas field is required to show by a preponderance of the evidence considered that the determination is in error.

Mary Nan Spear, 85 IBLA 303 (Mar. 15, 1985)

Pursuant to 30 U.S.C. § 226(b) (1982), where a portion of a noncompetitive lease offer is determined to be within a known geological structure of a producing oil or gas field, that portion within the known geological structure may only be leased by competitive bidding. Where lands are determined to be within a known geological structure at any time prior to issuance of a lease, an oil and gas lease offer for such lands must be rejected. An applicant for an oil and gas lease has no vested rights to issuance of a lease. The drawing of a simultaneous oil and gas lease application merely establishes the priority of filing an offer; it does not create any property or contract rights.

Satellite 8305141, 85 IBLA 307 (Mar. 19, 1985)

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 43 CFR 3120. A noncompetitive oil and gas lease offer is properly rejected where during the pendency thereof the land is determined to be within the known geologic structure of a producing oil or gas field. The drawing of an application for a noncompetitive oil and gas lease creates no vested rights in the applicant; it only establishes the priority to be accorded conflicting applications.

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of showing that the

OIL AND GAS LEASES--Continued

KNOWN GEOLOGIC STRUCTURE--Continued

determination is in error. Where appellant fails to show error, the determination will be upheld.

John P. Brogan, 85 IBLA 379 (Mar. 26, 1985)

Under 30 U.S.C. § 226(b) (1982), lands within the known geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where lands are determined to be within such a structure after a simultaneous oil and gas lease drawing but prior to issuance of a lease, a lease offer for such lands must be rejected. The offeror has no vested rights to issuance of a lease.

Where BLM rejects a noncompetitive oil and gas lease offer on the grounds the parcel sought to be leased lies within a known geologic structure, in the absence of supporting geological data in the record on appeal, a challenge to the KGS determination requires the decision be set aside as unsupported in fact.

Carolyn J. McCutchin, 86 IBLA 13 (Mar. 29, 1985)

Pursuant to 30 U.S.C. § 226(b) (1982), lands within the known geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where lands are determined to be within such a structure, a noncompetitive lease offer for such lands must be rejected.

An applicant for a noncompetitive oil and gas lease who challenges a determination that the land is within the known geologic structure of a producing oil or gas field has the burden of showing that the determination is in error.

Champlin Petroleum Co., 86 IBLA 37 (Apr. 9, 1985)

Where an applicant gained first priority in a drawing, but issuance of a noncompetitive lease was delayed, first by litigation and subsequently by a Secretarial order, and during the interim part of the land in that parcel was designated as within the known geologic structure of a producing oil or gas field, the application was properly rejected as to the land so designated.

Marc W. Richman, 86 IBLA 143 (Apr. 23, 1985)

Lands within a known geologic structure of a producing oil or gas field may only be leased by competitive bidding pursuant to 43 CFR Subpart 3120. A noncompetitive oil and gas lease offer filed before the lands were determined to be within a known geologic structure but not accepted by the United States on the date of determination is properly rejected.

Norma Richardson, 86 IBLA 168 (Apr. 25, 1985)

Pursuant to sec. 17(b) of the Mineral Leasing Act, as amended, 30 U.S.C. § 226(b) (1982), lands within the known geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where the lands are determined to be within a known geologic structure prior to issuance of a lease, a noncompetitive oil and gas lease offer for such lands must be rejected.

Satellite 8301106, Satellite 8303104, 86 IBLA 172 (Apr. 26, 1985)

Floyd L. Huenergarde, 88 IBLA 48 (July 15, 1985)

OIL AND GAS LEASES--Continued

KNOWN GEOLOGIC STRUCTURE--Continued

BLM may properly require the holder of a noncompetitive oil and gas lease to pay an increased rental of $2 per acre for the entire leasehold pursuant to 43 CFR 3103.2-2(d), where BLM determines during the lease term that any part of the lands included in the lease is within a known geologic structure.

James D. Creighton, 87 IBLA 79 (May 28, 1985)

Under 30 U.S.C. § 226(b) (1982), lands within the known geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where lands are determined to be within such a structure after a simultaneous oil and gas lease drawing but prior to issuance of a lease, a simultaneous oil and gas lease application for such lands must be rejected. The applicant has no vested right to issuance of a lease.

An applicant for a simultaneous oil and gas lease who challenges a determination by BLM that land is within the known geologic structure of a producing oil or gas field has the burden of showing the determination is in error.

Leonard Luning, 87 IBLA 123 (May 31, 1985)

Where the Bureau of Land Management has determined that any part of the lands described in a noncompetitive oil and gas lease is within an undefined addition to a known geologic structure, the lessee is required to pay increased rental of $2 per acre for the entire lease.

One who challenges a determination by the Bureau of Land Management that land is within the known geologic structure of a producing oil or gas field has the burden of showing that the determination is in error.

Ronald C. Agel, 87 IBLA 255 (June 21, 1985)

Land determined to be within the known geological structure of a producing oil and gas field may be leased only through competitive bidding and a noncompetitive offer for such land is properly rejected. One who believes the land should no longer be included in a known geological structure and wishes to obtain a noncompetitive lease for the land must first petition for rescission of the known geological determination.

Matthew C. Mays et al., 88 IBLA 39 (July 10, 1985)

Land within a known geologic structure of a producing oil or gas field may only be leased by competitive bidding pursuant to 43 CFR Subpart 3120. A noncompetitive oil and gas lease offer filed before lands were determined to be within a known geologic structure but not accepted by the United States on the date of determination is properly rejected to the extent of inclusion of such lands.

Paul Chachula, 88 IBLA 279 (Sept. 10, 1985)

Under 30 U.S.C. § 226(b) (1982), lands within the known geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where lands are determined to be within such a structure after a simultaneous oil and gas lease drawing but prior to issuance of a lease, a noncompetitive lease offer for such lands must be rejected.

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a

OIL AND GAS LEASES--Continued

KNOWN GEOLOGIC STRUCTURE--Continued

producing oil or gas field has the burden of showing that the determination is in error. Where the applicant fails to show error, the determination will be upheld.

Mary Lee H. Picou, 88 IBLA 356 (Sept. 26, 1985)

LANDS SUBJECT TO

Where an offer to lease oil and gas on acquired lands describes land, part of which is within an incorporated city and part of which is outside the city, the Mineral Leasing Act for Acquired Lands, as amended, 30 U.S.C. § 351 (1982), precludes leasing of those lands within the city.

Sam P. Jones (On Judicial Remand), 84 IBLA 331 (Jan. 11, 1985)

While the general Departmental policy is not to suspend oil and gas lease offers to await possible future leasing of lands, the policy is not without exception. Where circumstances warrant suspension and suspension is not precluded by 43 CFR 2091.1, oil and gas lease offers for acquired lands in the Nueces River Project under the jurisdiction of the Bureau of Reclamation may be suspended until the Bureau of Reclamation has completed its oil and gas management plan for that area.

Dinero Oil Corp., 84 IBLA 394 (Jan. 28, 1985)

The statutory withdrawal pursuant to the Act of Sept. 19, 1914, 38 Stat. 714, of certain lands from location, entry, or appropriation under the public land and mineral laws does not constitute a per se withdrawal from mineral leasing. Leases issued pursuant to the subsequently enacted Mineral Leasing Act of 1920, 30 U.S.C. §§ 181-287 (1982), are generally not considered to constitute a location, entry, or appropriation of the public lands embraced therein as these terms refer to acts by which a claim of title to the land is initiated.

Douglas H. Willson, W. G. Boonenberg, 86 IBLA 135 (Apr. 22, 1985) 92 I.D. 153

Generally, unless the mineral leasing laws or a withdrawal or reservation order specifically provides otherwise, lands withdrawn or reserved for a specific purpose are available for leasing, if issuance of a mineral lease would not be inconsistent with or interfere with the purpose for which the lands are withdrawn or reserved.

TXO Production Corp., 87 IBLA 85 (May 29, 1985)

BLM may not award priority as of the date of filing an amended over-the-counter noncompetitive oil and gas lease offer for acquired lands where the original lease offer was defective only to the extent of having included some land within an incorporated city, town, or village, which was unavailable for leasing under 30 U.S.C. § 352 (1982) and which was excluded from the amended offer.

Kenneth W. Mitchell, 88 IBLA 163 (Aug. 16, 1985)

OIL AND GAS LEASES--Continued

NONCOMPETITIVE LEASES

Under 30 U.S.C. § 226(b) (1982), lands within the known geological structure of a producing oil or gas field may be leased only by competitive bidding. Where lands are determined to be within such a structure after a simultaneous oil and gas lease drawing but prior to issuance of a lease, a lease offer for such lands must be rejected. The offeror has no vested rights to issuance of a lease.

Where BLM rejects a noncompetitive oil and gas lease offer on the grounds the parcel sought to be leased lies within a known geologic structure, in the absence of supporting geological data in the record on appeal, a challenge to the determination requires the decision be set aside as unsupported in fact.

Carolyn J. McCutchin, 84 IBLA 368 (Jan. 24, 1985)

Under 30 U.S.C. § 226(b) (1982), lands within the known geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where lands are determined to be within such a structure after a simultaneous oil and gas lease drawing but prior to issuance of a lease, a simultaneous oil and gas lease application for such lands must be rejected. The applicant has no vested rights to issuance of a lease.

An applicant for a simultaneous oil and gas lease who challenges a determination by BLM that land is within the known geologic structure of a producing oil or gas field has the burden of showing that the determination is in error.

R. E. O'Connell, 85 IBLA 29 (Jan. 30, 1985)

Pursuant to 30 U.S.C. § 226(b) (1982), lands within the geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where the lands are determined to be within a known geologic structure prior to issuance of a lease, a simultaneous oil and gas lease offer for such lands must be rejected.

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of establishing that the determination is in error. The determination will not be disturbed in the absence of a clear and definite showing of error.

Evelyn D. Fuckstuhl, 85 IBLA 69 (Feb. 11, 1985)

Lands within a known geologic structure of a producing oil or gas field may only be leased by competitive bidding pursuant to 43 CFR 3120. A noncompetitive oil and gas lease offer filed before the lands were determined to be within a known geologic structure but not accepted by the United States on the date of determination is properly rejected.

V. H. Jernigan, 85 IBLA 138 (Feb. 20, 1985)

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 43 CFR 3120. A noncompetitive oil and gas lease offer is properly rejected where during the pendency thereof the land is determined to be within the known geologic structure of a producing oil or gas field.

Victor E. Van Duzer, 85 IBLA 235 (Mar. 4, 1985)

OIL AND GAS LEASES--Continued

NONCOMPETITIVE LEASES--Continued

Under 30 U.S.C. § 226(b) (1982) land within the known geologic structure of a producing oil or gas field may only be leased by competitive bidding, and where land is determined to be within such a structure while a noncompetitive lease offer is pending, the offer must be rejected.

An applicant for a noncompetitive oil and gas lease who challenges a determination by the Geological Survey that land is within the known geologic structure of a producing oil or gas field is required to show by a preponderance of the evidence considered that the determination is in error.

Mary Nan Spear, 85 IBLA 303 (Mar. 15, 1985)

Pursuant to 30 U.S.C. § 226(b) (1982), where a portion of a noncompetitive lease offer is determined to be within a known geological structure of a producing oil or gas field, that portion within the known geological structure may only be leased by competitive bidding. Where lands are determined to be within a known geological structure at any time prior to issuance of a lease, an oil and gas lease offer for such lands must be rejected. An applicant for an oil and gas lease has no vested rights to issuance of a lease. The drawing of a simultaneous oil and gas lease application merely establishes the priority of filing an offer; it does not create any property or contract rights.

Satellite 8305141, 85 IBLA 307 (Mar. 19, 1985)

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 43 CFR 3120. A noncompetitive oil and gas lease offer is properly rejected where during the pendency thereof the land is determined to be within the known geologic structure of a producing oil or gas field. The drawing of an application for a noncompetitive oil and gas lease creates no vested rights in the applicant; it only establishes the priority to be accorded conflicting applications.

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of showing that the determination is in error. Where appellant fails to show error, the determination will be upheld.

John P. Brogan, 85 IBLA 379 (Mar. 26, 1985)

Under 30 U.S.C. § 226(b) (1982), lands within the known geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where lands are determined to be within such a structure after a simultaneous oil and gas lease drawing but prior to issuance of a lease, a lease offer for such lands must be rejected. The offeror has no vested rights to issuance of a lease.

Where BLM rejects a noncompetitive oil and gas lease offer on the grounds the parcel sought to be leased lies within a known geologic structure, in the absence of supporting geological data in the record on appeal, a challenge to the KGS determination requires the decision be set aside as unsupported in fact.

Carolyn J. McCutchin, 86 IBLA 13 (Mar. 29, 1985)

OIL AND GAS LEASES--Continued

NONCOMPETITIVE LEASES--Continued

Pursuant to 30 U.S.C. § 226(b) (1982), lands within the known geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where lands are determined to be within such a structure, a noncompetitive lease offer for such lands must be rejected.

An applicant for a noncompetitive oil and gas lease who challenges a determination that the land is within the known geologic structure of a producing oil or gas field has the burden of showing that the determination is in error.

Champlin Petroleum Co., 86 IBLA 37 (Apr. 9, 1985)

Where an applicant gained first priority in a drawing, but issuance of a noncompetitive lease was delayed, first by litigation and subsequently by a Secretarial order, and during the interim part of the land in that parcel was designated as within the known geologic structure of a producing oil or gas field, the application was properly rejected as to the land so designated.

Marc W. Richman, 86 IBLA 143 (Apr. 23, 1985)

Lands within a known geologic structure of a producing oil or gas field may only be leased by competitive bidding pursuant to 43 CFR Subpart 3120. A noncompetitive oil and gas lease offer filed before the lands were determined to be within a known geologic structure but not accepted by the United States on the date of determination is properly rejected.

Norma Richardson, 86 IBLA 168 (Apr. 25, 1985)

Pursuant to sec. 17(b) of the Mineral Leasing Act, as amended, 30 U.S.C. § 226(b) (1982), lands within the known geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where the lands are determined to be within a known geologic structure prior to issuance of a lease, a noncompetitive oil and gas lease offer for such lands must be rejected.

Satellite 8301106, Satellite 8303104, 86 IBLA 172 (Apr. 26, 1985)

Floyd L. Huenergarde, 88 IBLA 48 (July 15, 1985)

Under 30 U.S.C. § 226(b) (1982), lands within the known geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where lands are determined to be within such a structure after a simultaneous oil and gas lease drawing but prior to issuance of a lease, a simultaneous oil and gas lease application for such lands must be rejected. The applicant has no vested right to issuance of a lease.

An applicant for a simultaneous oil and gas lease who challenges a determination by BLM that land is within the known geologic structure of a producing oil or gas field has the burden of showing the determination is in error.

Leonard Luning, 87 IBLA 123 (May 31, 1985)

OIL AND GAS LEASES--Continued

NONCOMPETITIVE LEASES--Continued

One who challenges a determination by the Bureau of Land Management that land is within the known geologic structure of a producing oil or gas field has the burden of showing that the determination is in error.

Ronald C. Agel, 87 IBLA 255 (June 21, 1985)

BLM has the authority to issue notices of incidents of noncompliance, e.g., for failure to regravel an access road and to remove reserve pit fluids, and to levy an assessment under 43 CFR 3163.3 (1983) with respect to the operation of oil and gas wells on Federal noncompetitive oil and gas leases within a national forest.

Where BLM has issued a decision which levied an assessment for noncompliance with a previous order with respect to the operation of oil and gas wells on noncompetitive oil and gas leases and has afforded the lessee a technical and procedural review in accordance with 43 CFR 3165.3, the decision of that official is binding.

Riviera Drilling & Exploration, 87 IBLA 357 (June 27, 1985)

Land determined to be within the known geological structure of a producing oil and gas field may be leased only through competitive bidding and a noncompetitive offer for such land is properly rejected. One who believes the land should no longer be included in a known geological structure and wishes to obtain a noncompetitive lease for the land must first petition for rescission of the known geological determination.

Matthew C. Mays et al., 88 IBLA 39 (July 10, 1985)

Land within a known geologic structure of a producing oil or gas field may only be leased by competitive bidding pursuant to 43 CFR Subpart 3120. A noncompetitive oil and gas lease offer filed before lands were determined to be within a known geologic structure but not accepted by the United States on the date of determination is properly rejected to the extent of inclusion of such lands.

Paul Chachula, 88 IBLA 279 (Sept. 10, 1985)

Under 30 U.S.C. § 226(b) (1982), lands within the known geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where lands are determined to be within such a structure after a simultaneous oil and gas lease drawing but prior to issuance of a lease, a noncompetitive lease offer for such lands must be rejected.

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of showing that the determination is in error. Where the applicant fails to show error, the determination will be upheld.

Mary Lee H. Picou, 88 IBLA 356 (Sept. 26, 1985)

OIL AND GAS LEASES--Continued

OFFERS TO LEASE

In the absence of a proper receptacle for the receipt outside of established business hours of personally delivered filings, it was not improper for a BLM employee, prior to the opening of the BLM office, to receive acquired lands oil and gas lease offers in the hallway of the BLM office on the condition that they would be time and date stamped as of the opening of the office. An individual who voluntarily declined to submit his offer at that time cannot be heard later to claim unfair treatment and protest loss of priority because the offer presented by him was machine time stamped 1 minute after the opening of the office.

Harris-Headrick, 85 IBLA 48 (Feb. 6, 1985)

The statutory withdrawal pursuant to the Act of Sept. 19, 1914, 38 Stat. 714, of certain lands from location, entry, or appropriation under the public land and mineral laws does not constitute a per se withdrawal from mineral leasing. Leases issued pursuant to the subsequently enacted Mineral Leasing Act of 1920, 30 U.S.C. §§ 181-287 (1982), are generally not considered to constitute a location, entry, or appropriation of the public lands embraced therein as these terms refer to acts by which a claim of title to the land is initiated.

Douglas H. Willson, W. G. Boonenberg, 86 IBLA 135 (Apr. 22, 1985) 92 I.D. 153

BLM may not award priority as of the date of filing an amended over-the-counter noncompetitive oil and gas lease offer for acquired lands where the original lease offer was defective only to the extent of having included some land within an incorporated city, town, or village, which was unavailable for leasing under 30 U.S.C. § 352 (1982) and which was excluded from the amended offer.

Kenneth W. Mitchell, 88 IBLA 163 (Aug. 16, 1985)

REINSTATEMENT

Under 30 U.S.C. § 188(c) (1982), the Secretary is without authority to reinstate an oil and gas lease terminated by operation of law for failure to pay annual rental timely where the lessee fails to submit the full amount of rental due within 20 days of the anniversary date of the lease.

A petition for reinstatement of a terminated oil and gas lease under sec. 401 of the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. § 188(d), (e) (1982), must be filed on or before the earlier of (1) 60 days after the lessee received notice of termination, or (2) 15 months after termination of the lease. Where the lessee receives a notice of termination and fails to file a petition within 60 days, reinstatement is properly denied.

Jerry D. Powers, 85 IBLA 116 (Feb. 15, 1985)

An oil and gas lease on which there is no well capable of producing oil or gas in paying quantities automatically terminates by operation of law if the lessee fails to pay the annual rental on or before the anniversary date of the lease. 30 U.S.C. § 188(b) (1982). Under 30 U.S.C. § 188(c) (1982), the Department of the Interior has no authority to make a class I reinstatement of a terminated oil and gas lease where the rental payment is not tendered at the proper office within 20 days after the due date.

"Tender." Placing a check for annual rental for oil and gas leases in the mails does not constitute a

OIL AND GAS LEASES--Continued

REINSTATEMENT--Continued

tender of payment within the meaning of 43 CFR 3108.2-1(c). A tender of rental payment is made only when a lessee submits payment to the BLM office administering his lease, providing BLM with the opportunity either to receive or decline payment. Accordingly, placing rental in the mails does not constitute a tender of payment which would allow the Department to consider the merits of a petition for a class I reinstatement of an oil and gas lease.

William E. Phalen, 85 IBLA 151 (Feb. 25, 1985)

Under 30 U.S.C. § 188(c) (1982), the Secretary is without authority to reinstate an oil and gas lease terminated by operation of law for failure to pay annual rental timely where the lessee fails to submit the full amount of rental due within 20 days of the anniversary date of the lease.

Leases reinstated pursuant to 30 U.S.C. § 188(d) (1982) shall be subject to the conditions contained in 30 U.S.C. § 188(e) (1982).

Charles F. Egger, John E. Jones, Jimmy R. Lynn II, 85 IBLA 385 (Mar. 27, 1985)

Pursuant to 30 U.S.C. § 188(b) (1982), when the lessee fails to pay the required rental on or before the anniversary date of the lease, and no oil and gas is being produced on the leased premises, the lease shall automatically terminate by operation of law. The Secretary may reinstate the lease, pursuant to 30 U.S.C. § 188(c) (1982), if the full rental is paid within 20 days of the lease anniversary date, and the failure to timely pay was justifiable or not due to a lack of reasonable diligence. Mailing the rental payment after the lease anniversary date does not constitute reasonable diligence.

Late payment of annual rental may be considered justifiable if the untimeliness was proximately caused by extenuating circumstances outside the lessee's control at or near the anniversary date. A lessee's failure to timely pay rental is not justifiable where the lessee was merely financially unable to pay the rental when due.

In order to qualify for class II reinstatement, the lessee must establish that the failure to timely pay was inadvertent. An inadvertent act involves carelessness, oversight, mistake, or the failure to pay careful and prudent attention to a situation. A lessee's failure to timely pay rental is not inadvertent where the lessee was merely financially unable to pay the rental when due.

Dena F. Collins, 86 IBLA 32 (Apr. 3, 1985)

When the lessee fails to pay rentals on or before the anniversary date of the lease, and no oil or gas in paying quantities is being produced on the leased premises, the lease shall automatically terminate by operation of law pursuant to 30 U.S.C. § 188(b) (1982). The Secretary may reinstate the lease, pursuant to 30 U.S.C. § 188(b) (1982), if the full rental is paid within 20 days of the lease anniversary date and the failure to timely pay the rental was justifiable or not due to a lack of reasonable diligence. When the failure to timely pay the rental was due to the lessee's own neglect, the failure to timely pay is neither justifiable nor demonstrative of reasonable diligence. Therefore a petition for reinstatement under 30 U.S.C. § 188(c) (1982) must be rejected.

Edgar B. Stern, 86 IBLA 72 (Apr. 10, 1985)

OIL AND GAS LEASES--Continued

REINSTATEMENT--Continued

Where rental payment for an oil and gas lease with a June 1 anniversary date is postmarked May 31 and received in the proper office on June 5, under 43 CFR 3108.2-1(a) such action may constitute reasonable diligence for purposes of class I reinstatement; however, where the payment is less than the full amount and the lessee fails to pay the full amount within 20 days after the anniversary date, class I reinstatement is precluded.

James & Lillian Chudnow, 86 IBLA 315 (May 14, 1985)

An oil and gas lease on which there is no well capable of producing oil or gas in paying quantities automatically terminates by operation of law if the lessee fails to pay the annual rental on or before the anniversary date of the lease. 30 U.S.C. § 188(b) (1982). Under 30 U.S.C. § 188(c) (1982), the Department of the Interior has no authority to reinstate a terminated oil and gas lease where the rental payment is not tendered at the proper office within 20 days after the due date.

Where a proposed assignment of an oil and gas lease has not been approved by BLM and the lease has automatically terminated by operation of law for failure to pay rental timely, only the original lessee as holder of the record of the lease, and not the potential assignee, may petition to have the lease reinstated on the grounds that reasonable diligence was exercised or that the late payment was justified.

J. Edward Hollington, Richard H. Peterson, 86 IBLA 345 (May 16, 1985)

Under 30 U.S.C. § 188(c) (1982), BLM has no authority to reinstate a noncompetitive oil and gas lease terminated automatically for nonpayment of annual rental where the rental payment was not tendered at the proper office within 20 days after the anniversary date.

BLM may properly condition class II reinstatement, under 30 U.S.C. § 188(d) and (e) (1982), of a noncompetitive oil and gas lease terminated automatically for nonpayment of annual rental upon tender of the required back rental, computed at the increased rate of $5 per acre set forth in 30 U.S.C. § 188(e)(2) (1982), within 60 days after receipt of a notice of termination.

Hugh Carter Crutchfield Trust, 87 IBLA 27 (May 22, 1985)

When the lessee fails to pay rental on or before the anniversary date of the lease, and no oil and gas in paying quantities is being produced on the leased premises, the lease shall automatically terminate by operation of law pursuant to 30 U.S.C. § 188(b) (1982). The Secretary may reinstate the lease, pursuant to 30 U.S.C. § 188(c) (1982), if the full rental is paid within 20 days of the lease anniversary date and the failure to timely pay the rental was justifiable or not due to a lack of reasonable diligence. When the failure to timely pay the rental was due to the lessee's own neglect, the failure to timely pay is neither justifiable nor demonstrative of reasonable diligence. Therefore, a petition for reinstatement under 30 U.S.C. § 188(c) (1982) must be rejected.

Freedom Oil Co., Inc., 87 IBLA 71 (May 28, 1985)

OIL AND GAS LEASES--Continued

REINSTATEMENT--Continued

Under 30 U.S.C. § 188(c) (1982), the Secretary is without authority to reinstate an oil and gas lease terminated by operation of law for failure to pay annual rental timely where the lessee fails to submit the full amount of rental due within 20 days of the anniversary date of the lease.

Under 30 U.S.C. § 188(d), (e) (1982), a noncompetitive oil and gas lease terminated automatically for untimely payment of annual rental may be reinstated if the petitioner shows that failure to pay timely was inadvertent and submits within 60 days from receipt of notice of termination a petition for reinstatement together with the required back rental accruing from the date of termination. Petitioner must also agree to increased rental and royalty rates and submit a reinstatement fee and Federal Register publication costs.

Donald D. Dunn, 87 IBLA 316 (June 25, 1985)

Under 30 U.S.C. § 188(c) (1982), the Department has no authority to reinstate an oil and gas lease terminated by operation of law for failure to pay annual rental timely where the lessee fails to submit the full amount of rental due within 20 days of the anniversary date of the lease.

Where a proposed assignment of an oil and gas lease has not been approved by BLM and the lease has automatically terminated by operation of law for failure to pay rental timely, only the original lessee as holder of record of the lease, and not the potential assignee, may petition to have the lease reinstated pursuant to 43 U.S.C. § 188(c) (1982).

Otto C. Svancara, Grete Svancara, 87 IBLA 319 (June 25, 1985)

Under 30 U.S.C. § 188(c) (1982), the Secretary is without authority to reinstate an oil and gas lease terminated by operation of law for failure to pay annual rental timely where the lessee fails to submit the full amount of rental due within 20 days of the anniversary date of the lease.

Marion E. Banks, Noble Craver, & August Carniglia, 88 IBLA 341 (Sept. 19, 1985)

RELINQUISHMENTS

An oil and gas lease may be relinquished by filing a written relinquishment in the proper BLM office. A relinquishment is effective on the date of its filing with BLM. However, a partial relinquishment filed after the lease has automatically terminated by operation of law is ineffective.

James & Lillian Chudnow, 86 IBLA 315 (May 14, 1985)

Where the anniversary date of an oil and gas lease falls on a day when the proper office for payment is not open, a partial rental payment together with a partial relinquishment personally delivered to the proper state office on the next official working day serves to extend that part of the lease covered by the rental payment. A BLM decision finding such a lease to have terminated for failure to pay the full amount of the rental must be reversed.

Monty Cranston, Inc., 86 IBLA 322 (May 16, 1985)

OIL AND GAS LEASES--Continued

RENTALS

An oil and gas lease on which there is no well capable of producing oil or gas in paying quantities automatically terminates by operation of law if the lessee fails to pay the annual rental on or before the anniversary date of the lease. 30 U.S.C. § 188(b) (1982). Under 30 U.S.C. § 188(c) (1982), the Department of the Interior has no authority to make a class I reinstatement of a terminated oil and gas lease where the rental payment is not tendered at the proper office within 20 days after the due date.

"Tender." Placing a check for annual rental for oil and gas leases in the mails does not constitute a tender of payment within the meaning of 43 CFR 3108.2-1(c). A tender of rental payment is made only when a lessee submits payment to the BLM office administering his lease, providing BLM with the opportunity either to receive or decline payment. Accordingly, placing rental in the mails does not constitute a tender of payment which would allow the Department to consider the merits of a petition for a class I reinstatement of an oil and gas lease.

William E. Phalen, 85 IBLA 151 (Feb. 25, 1985)

Where first-drawn applicants for simultaneous oil and gas leases violate provisions of 43 CFR 3112.6-1, by failing to submit the first year's advance rental payment in the proper office within 30 days of notice to do so, and by failing to offer payment personally or through an attorney-in-fact, the offers must be rejected.

Satellite 8307193 et al., 85 IBLA 357 (Mar. 25, 1985)

Where an individual whose application has been drawn with first priority for an oil and gas lease in the simultaneous leasing program fails to submit the signed lease offers or the advance rentals within 30 days of notice by BLM, the application must be rejected, regardless of any justification which the applicant may provide for his failure to timely transmit the documents.

F. Miles Ezell, Sr., 86 IBLA 146 (Apr. 25, 1985)

An oil and gas lease on which there is no well capable of producing oil or gas in paying quantities automatically terminates by operation of law if the lessee fails to pay the annual rental on or before the anniversary date of the lease. 30 U.S.C. § 188(b) (1982). Under 30 U.S.C. § 188(c) (1982), the Department of the Interior has no authority to reinstate a terminated oil and gas lease where the rental payment is not tendered at the proper office within 20 days after the due date.

J. Edward Hollington, Richard H. Peterson, 86 IBLA 345 (May 16, 1985)

BLM may properly require the holder of a noncompetitive oil and gas lease to pay an increased rental of $2 per acre for the entire leasehold pursuant to 43 CFR 3103.2-2(d), where BLM determines during the lease term that any part of the lands included in the lease is within a known geologic structure.

James D. Creighton, 87 IBLA 79 (May 28, 1985)

OIL AND GAS LEASES--Continued

RENTALS--Continued

Where the Bureau of Land Management has determined that any part of the lands described in a noncompetitive oil and gas lease is within an undefined addition to a known geologic structure, the lessee is required to pay increased rental of $2 per acre for the entire lease.

Ronald C. Agel, 87 IBLA 255 (June 21, 1985)

Where BLM mails a notice to the first-drawn applicant in a simultaneous oil and gas lease drawing requiring the applicant to execute a lease offer and tender the first year's rental in accordance with 43 CFR 3112.6-1(a), the failure to return the rental payment and executed lease offer within the 30-day period properly results in rejection of the offer. The offeror's absence from his address of record when the notice was received at that address will not excuse noncompliance with 43 CFR 3112.6-1.

Richard L. Knowles, 88 IBLA 120 (Aug. 1, 1985)

Where BLM mails a notice to the first-drawn applicant in a simultaneous oil and gas lease drawing requiring the applicant to execute a lease offer and to tender the first year's rental in accordance with 43 CFR 3112.6-1(a), the failure to return the rental payment and executed lease offer within the 30-day period properly results in rejection of the offer.

Lottery Risk BO., Ltd., 88 IBLA 160 (Aug. 15, 1985)

An oil and gas lease offer is properly rejected where the offer is deficient in the first year's rental by more than 10 percent.

Dorothy L. Davis, 88 IBLA 282 (Sept. 10, 1985)

An essential element of a claim for estoppel is that the party asserting it must be ignorant of the true facts. Since, however, all persons are presumed to have knowledge of relevant statutory and regulatory provisions, an individual may not premise a claim of estoppel on information or advice contrary to such a provision.

Marion E. Banks, Noble Craver, & August Carniglia, 88 IBLA 341 (Sept. 19, 1985)

RIGHTS-OF-WAY LEASES

Lands under a railroad right-of-way issued pursuant to the Act of Mar. 3, 1875, 18 Stat. 482, are not properly leased under the Mineral Leasing Act of 1920, 30 U.S.C. § 181 (1982), but instead must be leased under the exclusive authority of the Act of May 21, 1930, 30 U.S.C. §§ 301-306 (1982).

William L. Ahls, 85 IBLA 66 (Feb. 11, 1985)

ROYALTIES

Where the lessee under an outer continental shelf oil and gas lease diverts gas produced under the lease from buyer A to buyer B in order to fulfill a warranty contract and computes royalty on the basis of the contract price to B, the Minerals Management Service may properly recompute the royalty based on the contract price to A where the price that would have been paid by buyer A represents the reasonable unit value of production under 30 CFR 250.64 (1982), i.e., the highest price which could be received for the gas at the time

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

of production, despite prior approval of use of the warranty contract price for calculation of royalties for gas produced under other leases.

Amoco Production Co., 85 IBLA 121 (Feb. 15, 1985)

STIPULATIONS

Where an oil and gas lessee does not protest or appeal a special stipulation added by BLM to a permit to drill within 30 days after notice thereof, the lessee cannot be heard to complain about the stipulation as long as BLM's interpretation of the stipulation is reasonable.

Where the Board determines that the plain language of a stipulation in a permit to drill is clear and unambiguous in its imposition of liability on the operator if a specified archaeological site is altered, BLM must be affirmed in its enforcement of the stipulation.

Beartooth Oil & Gas Co., 85 IBLA 11 (Jan. 30, 1985)
92 I.D. 74

Under the Mineral Leasing Act for Acquired Lands of 1947, as amended, 30 U.S.C. §§ 351-359 (1982), if the lands embraced within an oil and gas lease application are under surface jurisdiction of a service or bureau within the Department of the Interior, such as the Bureau of Reclamation, the consent of the Secretary of the Interior is necessary under the Act for leasing of the land.

Robert J. Sherney, 88 IBLA 61 (July 22, 1985)

SUSPENSIONS

Where a blizzard prevented a drilling rig from reaching a drill site in time to begin operations before the Nov. 30 expiration date of the lease, and a lease suspension was therefor granted effective Nov. 1, to "terminate automatically on the first of the month in which actual approved drilling operations are commenced," and such operations were commenced on Dec. 7, the new expiration date of the initial lease term was Dec. 31. Because the resultant dry hole was drilled, finished, plugged, and abandoned by Dec. 25, no drilling operations were in progress at the close of Dec. 31, and the lease expired. The drilling operations previously concluded did not qualify the lease for a 2-year extension.

Milestone Petroleum, Inc., Phillips Oil Co., 85 IBLA 96 (Feb. 14, 1985)

A suspension of operations and production under sec. 39, which by law extends the term of the lease for the period of suspension, must be a suspension of both operations and production such that the lessee has been denied beneficial use of the lease by the Department in the interest of conservation. Lease activity (operations or production) is beneficial use and may not be allowed to commence or continue while the lease is suspended.

Sec. 25 of the standard form unit agreement, 43 CFR 3186.1, only relieves the unit operator from compliance with unit drilling, operating, and producing requirements. In the absence of production or of a well capable of production, the unit operator

OIL AND GAS LEASES--Continued

SUSPENSIONS--Continued

must still obtain a sec. 39 suspension, and must comply with the requirements of sec. 39, in order to prevent leases from expiring while he is excused from unit requirements.

Suspensions of operations or of production under sec. 17(f) toll the running of the lease term but do not suspend the payment of rental or minimum royalty.

Previous oil and gas lease suspensions that were granted, but where the Department allowed lease activity during the period of suspension, were made in the absence of clear legal guidance to the contrary. One was based on the surname of the Solicitor. In such situations, later advice that the action taken is not in accordance with a proper interpretation of the statute should only be given prospective application. However, in the future, suspensions should only be granted or directed in a manner consistent with the law as interpreted in this memorandum.

Oil & Gas Lease Suspension, M-36953 (May 31, 1985)
92 I.D. 293

The Secretary of the Interior may properly delegate the authority to suspend oil and gas leases, and, the party to whom this authority is delegated may act on behalf of the Secretary in approving applications for suspension.

American Resource Management Corp. (On Judicial Remand), 88 IBLA 172 (Aug. 20, 1985)

An appeal to the Board of Land Appeals of a decision by the Director, Bureau of Land Management, affirming a regional conservation manager's decision not to approve a unit agreement will be dismissed as moot where the noncompetitive oil and gas leases proposed for inclusion in the unit have expired by the running of their primary terms without benefit of development or production. Delays by the Department in considering an appeal pursuant to 30 CFR Part 290 of the conservation manager's decision do not constitute a de facto suspension of the oil and gas leases proposed for the unit which would extend the leases.

Jack J. Grynberg, 88 IBLA 330 (Sept. 19, 1985)

TERMINATION

Under 30 U.S.C. § 188(c) (1982), the Secretary is without authority to reinstate an oil and gas lease terminated by operation of law for failure to pay annual rental timely where the lessee fails to submit the full amount of rental due within 20 days of the anniversary date of the lease.

A petition for reinstatement of a terminated oil and gas lease under sec. 401 of the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. § 188(d), (e) (1982), must be filed on or before the earlier of (1) 60 days after the lessee received notice of termination, or (2) 15 months after termination of the lease. Where the lessee receives a notice of termination and fails to file a petition within 60 days, reinstatement is properly denied.

Jerry D. Powers, 85 IBLA 116 (Feb. 15, 1985)

OIL AND GAS LEASES--Continued

TERMINATION--Continued

An oil and gas lease on which there is no well capable of producing oil or gas in paying quantities automatically terminates by operation of law if the lessee fails to pay the annual rental on or before the anniversary date of the lease. 30 U.S.C. § 188(b) (1982). Under 30 U.S.C. § 188(c) (1982), the Department of the Interior has no authority to make a class I reinstatement of a terminated oil and gas lease where the rental payment is not tendered at the proper office within 20 days after the due date.

William E. Phalen, 85 IBLA 151 (Feb. 25, 1985)

Under 30 U.S.C. § 188(c) (1982), the Secretary is without authority to reinstate an oil and gas lease terminated by operation of law for failure to pay annual rental timely where the lessee fails to submit the full amount of rental due within 20 days of the anniversary date of the lease.

Leases reinstated pursuant to 30 U.S.C. § 188(d) (1982) shall be subject to the conditions contained in 30 U.S.C. § 188(e) (1982).

Charles F. Egger, John F. Jones, Jimmy R. Lynn II, 85 IBLA 385 (Mar. 27, 1985)

Pursuant to 30 U.S.C. § 188(b) (1982), when the lessee fails to pay the required rental on or before the anniversary date of the lease, and no oil and gas is being produced on the leased premises, the lease shall automatically terminate by operation of law. The Secretary may reinstate the lease, pursuant to 30 U.S.C. § 188(c) (1982), if the full rental is paid within 20 days of the lease anniversary date, and the failure to timely pay was justifiable or not due to a lack of reasonable diligence. Mailing the rental payment after the lease anniversary date does not constitute reasonable diligence.

Late payment of annual rental may be considered justifiable if the untimeliness was proximately caused by extenuating circumstances outside the lessee's control at or near the anniversary date. A lessee's failure to timely pay rental is not justifiable where the lessee was merely financially unable to pay the rental when due.

In order to qualify for class II reinstatement, the lessee must establish that the failure to timely pay was inadvertent. An inadvertent act involves carelessness, oversight, mistake, or the failure to pay careful and prudent attention to a situation. A lessee's failure to timely pay rental is not inadvertent where the lessee was merely financially unable to pay the rental when due.

Lena F. Collins, 86 IBLA 32 (Apr. 3, 1985)

When the lessee fails to pay rentals on or before the anniversary date of the lease, and no oil or gas in paying quantities is being produced on the leased premises, the lease shall automatically terminate by operation of law pursuant to 30 U.S.C. § 188(b) (1982). The Secretary may reinstate the lease, pursuant to 30 U.S.C. § 188(b) (1982), if the full rental is paid within 20 days of the lease anniversary date and the failure to timely pay the rental was justifiable or not due to a lack of reasonable diligence. When the failure to timely pay the rental was due to the lessee's own neglect, the failure to timely pay is neither justifiable nor demonstrative of reasonable diligence. Therefore a petition for reinstatement under 30 U.S.C. § 188(c) (1982) must be rejected.

Edgar B. Stern, 86 IBLA 72 (Apr. 10, 1985)

OIL AND GAS LEASES--Continued

TERMINATION--Continued

Where rental payment for an oil and gas lease with a June 1 anniversary date is postmarked May 31 and received in the proper office on June 5, under 43 CFR 3108.2-1(a) such action may constitute reasonable diligence for purposes of class I reinstatement; however, where the payment is less than the full amount and the lessee fails to pay the full amount within 20 days after the anniversary date, class I reinstatement is precluded.

James & Lillian Chudnow, 86 IBLA 315 (May 14, 1985)

An oil and gas lease on which there is no well capable of producing oil or gas in paying quantities automatically terminates by operation of law if the lessee fails to pay the annual rental on or before the anniversary date of the lease. 30 U.S.C. § 188(b) (1982). Under 30 U.S.C. § 188(c) (1982), the Department of the Interior has no authority to reinstate a terminated oil and gas lease where the rental payment is not tendered at the proper office within 20 days after the due date.

J. Edward Hollington, Richard H. Peterson, 86 IBLA 345 (May 16, 1985)

Under 30 U.S.C. § 188(c) (1982), BLM has no authority to reinstate a noncompetitive oil and gas lease terminated automatically for nonpayment of annual rental where the rental payment was not tendered at the proper office within 20 days after the anniversary date.

BLM may properly condition class II reinstatement, under 30 U.S.C. § 188(d) and (e) (1982), of a noncompetitive oil and gas lease terminated automatically for nonpayment of annual rental upon tender of the required back rental, computed at the increased rate of $5 per acre set forth in 30 U.S.C. § 188(e)(2) (1982), within 60 days after receipt of a notice of termination.

Huth Carter Crutchfield Trust, 87 IBLA 27 (May 22, 1985)

When the lessee fails to pay rental on or before the anniversary date of the lease, and no oil and gas in paying quantities is being produced on the leased premises, the lease shall automatically terminate by operation of law pursuant to 30 U.S.C. § 188(b) (1982). The Secretary may reinstate the lease, pursuant to 30 U.S.C. § 188(c) (1982), if the full rental is paid within 20 days of the lease anniversary date and the failure to timely pay the rental was justifiable or not due to a lack of reasonable diligence. When the failure to timely pay the rental was due to the lessee's own neglect, the failure to timely pay is neither justifiable nor demonstrative of reasonable diligence. Therefore, a petition for reinstatement under 30 U.S.C. § 188(c) (1982) must be rejected.

Freedom Oil Co., Inc., 87 IBLA 71 (May 28, 1985)

Under 30 U.S.C. § 188(c) (1982), the Secretary is without authority to reinstate an oil and gas lease terminated by operation of law for failure to pay annual rental timely where the lessee fails to submit the full amount of rental due within 20 days of the anniversary date of the lease.

Under 30 U.S.C. § 188(d), (e) (1982), a noncompetitive oil and gas lease terminated automatically for untimely payment of annual rental may be reinstated if the petitioner shows that failure to pay timely was inadvertent and submits within 60 days from receipt of notice of termination a petition for reinstatement together with the required back rental accruing from the date of termination. Petitioner must also agree

OIL AND GAS LEASES--Continued

TERMINATION--Continued

to increased rental and royalty rates and submit a reinstatement fee and Federal Register publication costs.

Donald D. Dunn, 87 IBLA 316 (June 25, 1985)

Under 30 U.S.C. § 188(c) (1982), the Department has no authority to reinstate an oil and gas lease terminated by operation of law for failure to pay annual rental timely where the lessee fails to submit the full amount of rental due within 20 days of the anniversary date of the lease.

Otto C. Svancara, Grete Svancara, 87 IBLA 319 (June 25, 1985)

Where the record shows that at the end of the primary term of an oil and gas lease, there is no production of oil or gas in paying quantities from the lease area, and no well capable of such production, the lease expires at the end of its term in the absence of diligent drilling operations initiated prior to the expiration or suspension of the lease.

The partial commitment of lands within an oil and gas lease to a unit agreement segregates the land in the lease into separate leases embracing those lands committed to the unit and those lands not unitized. The lease committed to the unit continues in effect for so long as committed, provided that production is obtained within the unit prior to expiration of the term of the lease.

American Resource Management Corp. (On Judicial Remand), 88 IBLA 172 (Aug. 20, 1985)

Under 30 U.S.C. § 188(c) (1982), the Secretary is without authority to reinstate an oil and gas lease terminated by operation of law for failure to pay annual rental timely where the lessee fails to submit the full amount of rental due within 20 days of the anniversary date of the lease.

Marion E. Banks, Noble Craver, & August Carniglia, 88 IBLA 341 (Sept. 19, 1985)

UNIT AND COOPERATIVE AGREEMENTS

In determining whether or not a unit well is capable of producing unitized substances in paying quantities a "preponderance of the evidence" standard of proof must be employed. In determining whether or not one has met the applicable standard of proof, this Board will consider the actual standard applied rather than the phrase employed by the factfinder to describe it.

This Board may rely on reports of Departmental technical experts in determining whether or not a unit well is capable of producing unitized substances in paying quantities. A determination by Departmental technical experts will not be set aside where it is not arbitrary or capricious, and is supported by competent evidence.

The Bureau of Land Management practice of deducting overriding royalties from gross revenue in making "paying quantities" determinations is the accepted trade practice, custom, and usage. Where a well-established practice or custom is shown to exist, it is assumed that the parties to a contract intended that

OIL AND GAS LEASES--Continued

UNIT AND COOPERATIVE AGREEMENTS--Continued

practice or custom to apply in the absence of express language in the contract to the contrary.

Woods Petroleum Co., 86 IBLA 46 (Apr. 10, 1985)

Sec. 25 of the standard form unit agreement, 43 CFR 3186.1, only relieves the unit operator from compliance with unit drilling, operating, and producing requirements. In the absence of production or of a well capable of production, the unit operator must still obtain a sec. 39 suspension, and must comply with the requirements of sec. 39, in order to prevent leases from expiring while he is excused from unit requirements.

Oil & Gas Lease Suspension, M-36953 (May 31, 1985) 92 I.D. 293

The partial commitment of lands within an oil and gas lease to a unit agreement segregates the land in the lease into separate leases embracing those lands committed to the unit and those lands not unitized. The lease committed to the unit continues in effect for so long as committed, provided that production is obtained within the unit prior to expiration of the term of the lease.

American Resource Management Corp. (On Judicial Remand), 88 IBLA 172 (Aug. 20, 1985)

Where the record establishes that a party holding the entire working interest in a tract has committed that interest to a unit agreement which has been subsequently approved in the public interest, but the tract was found not to be committed on the erroneous belief that less than the entire working interest was committed, a decision holding an oil and gas well on the tract not to be a unit well will be reversed.

Nucorp Energy, Inc., 88 IBLA 195 (Aug. 21, 1985)

An appeal to the Board of Land Appeals of a decision by the Director, Bureau of Land Management, affirming a regional conservation manager's decision not to approve a unit agreement will be dismissed as moot where the noncompetitive oil and gas leases proposed for inclusion in the unit have expired by the running of their primary terms without benefit of development or production. Delays by the Department in considering an appeal pursuant to 30 CFR Part 290 of the conservation manager's decision do not constitute a de facto suspension of the oil and gas leases proposed for the unit which would extend the leases.

Jack J. Grynberg, 88 IBLA 330 (Sept. 19, 1985)

OIL SHALE

WITHDRAWALS

Mining claims located on land previously withdrawn from mineral entry by Exec. Order No. 5327 and Public Land Order No. 4522 are properly declared null and void ab initio.

Azome Utah Mining Co., 86 IBLA 170 (Apr. 25, 1985)

OMB CIRCULAR A-76

An appeal arising out of a cost comparison by the National Park Service under OMB Circular A-76 is dismissed as moot where a newly enacted statute prohibits the National Park Service from awarding any contracts pursuant to the Circular absent specific appropriations therefor, and no specific appropriations are provided for the purpose of the contract.

Appeal of B&N Service Industries, Inc., IBCA-1859 (A-76) (Jan. 2, 1985) 92 I.D. 36

OREGON AND CALIFORNIA RAILROAD AND RECONVEYED COOS BAY GRANT LANDS

TIMBER SALES

Where, subsequent to the issuance of a final programmatic EIS detailing a specific level of clearcutting activities, it is determined to substantially increase the amount of acreage to be clearcut, far beyond any level reasonably foreseeable by a review of the EIS, BLM must either issue a new EIS or a supplemental EIS prior to implementing the increased level of clearcutting.

A party seeking to establish that BLM has violated applicable policies regarding clearcutting on Federal leases has the burden of showing error in BLM's actions. A mere disagreement or difference of opinion will not establish such error.

Sec. 1 of the Act of Aug. 28, 1937, 43 U.S.C. § 1181a-1181f (1982), requires that revested Oregon and California Railroad lands classified as timberlands shall be managed (with one exception) for permanent forest production and that the timber thereon shall be sold, cut, and removed in conformity with the principle of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facilities.

Authority for BLM's clearcut harvest of low-intensity lands, whose timber forms no part of allowable cut, is found in sec. 307(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1737(a) (1982), wherein the Secretary is authorized to conduct investigations, studies, and experiments on his own initiative or in cooperation with others involving the management, protection, development, acquisition, and conveying of public lands.

In re Upper Floras Timber Sale et al., 86 IBLA 296 (May 13, 1985)

A decision to implement a timber sale proposal based on a finding of no significant impact may be remanded where the environmental assessment for the sale, which supplements and is tiered to the programmatic environmental impact statement for the 10-year timber management program in the district, fails to adequately consider the site-specific impacts of the sale including any aspects of the timber sale which vary significantly from the parameters considered in the programmatic environmental impact statement.

In re Humpy Mountain Timber Sale, 88 IBLA 7 (June 28, 1985)

OUTER CONTINENTAL SHELF LANDS ACT

GENERALLY

The statutory definition of "Outer Continental Shelf" applies to submerged lands seaward of those granted to the States in the Submerged Lands Act.

The statutory definition of "Outer Continental Shelf" includes all submerged lands which the United States currently claims under international law as being subject to its jurisdiction and control.

Generally, because the United States currently claims Continental Shelf jurisdiction to a minimum of 200 nautical miles from its coasts, the Secretary has the authority to issue mineral leases covering areas within 200 miles of the coasts of the 50 States.

Authority to Issue Outer Continental Shelf Mineral Leases in the Gorda Ridge Area, M-36952 (May 30, 1985) 92 I.D. 459

OIL AND GAS LEASES

Where the lessee under an outer continental shelf oil and gas lease diverts gas produced under the lease from buyer A to buyer B in order to fulfill a warranty contract and computes royalty on the basis of the contract price to B, the Minerals Management Service may properly recompute the royalty based on the contract price to A where the price that would have been paid by buyer A represents the reasonable unit value of production under 30 CFR 250.64 (1982), i.e., the highest price which could be received for the gas at the time of production, despite prior approval of use of the warranty contract price for calculation of royalties for gas produced under other leases.

Amoco Production Co., 85 IBLA 121 (Feb. 15, 1985)

PATENTS OF PUBLIC LANDS

GENERALLY

Where lands in a grant or patent from the United States are described in terms of the rectangular surveying system, the right, title, or interest acquired thereby is that defined by the corners of the original Government survey upon which the description is based.

A survey of public lands creates and does not merely identify the boundaries of sections of land. A patentee of public land takes according to the actual survey on the ground, even though the official survey plat may not show the tract as it is located on the ground, or the patent description may be in error as to the quantity of land stated.

Where a plat of resurvey indicates that more land is included within the boundaries of a patented tract than was shown by the plat of original survey in accordance with which the patent was issued, the boundaries of the patented tract as established by the original survey, and not the acreage indicated on the plat of the original survey, determine the quantity of land which was conveyed by the patent.

Robert R. Perry, 87 IBLA 380 (June 28, 1985)

EFFECT

Where lands were patented under a statute which authorized the granting of nonmineral lands only, the issuance of the patent generally constituted a conclusive determination by the United States of the nonmineral character of the land so patented, and the

PATENTS OF PUBLIC LANDS--Continued

EFFECT--Continued

subsequent discovery of mineral values thereon does not operate to void the conveyance by the United States.

Silver Buckle Mines, Inc., 84 IBLA 306 (Jan. 7, 1985)

When the United States patents "nonmineral" land to the State of Washington in exchange for State land located within a national forest, the issuance of a patent constitutes a conclusive determination by the United States that the land was nonmineral in character, and, in the absence of fraud, any subsequent identification or discovery of minerals thereon does not operate to void the conveyance by the United States or to create a reservation of the minerals in the United States. Therefore, mining claims located on "nonmineral" land patented to the State without reservation of the mineral estate are null and void ab initio, even though the State at one time mistakenly concluded that the patent did not convey the mineral estate.

David C. Brockens, 85 IBLA 1 (Jan. 30, 1985)

Land which has been patented without a reservation of minerals to the United States is not available for the location of mining claims. Mining claims located on such lands are null and void ab initio. Attempts to record such mining claims or file affidavits of assessment work or notices of intent to hold such mining claims are properly rejected.

Ralph C. Memmott, 88 IBLA 360 (Sept. 27, 1985)

Land which has been patented without a reservation of minerals to the United States is not available for the location of mining claims. Mining claims located on such lands are void ab initio.

Ralph C. Memmott, 88 IBLA 363 (Sept. 27, 1985)

Ralph C. Memmott, 88 IBLA 367 (Sept. 27, 1985)

RESERVATIONS

Language excluding mineral lands which was included in a patent of railroad grant lands does not operate as a mineral reservation or diminish the estate vested in the grantee upon later discovery of minerals in the land. The issuance of a railroad grant lands patent generally constitutes a conclusive determination by the United States of the nonmineral character of the land.

Where land has been patented under a railroad land grant and only the surface estate has been reconveyed to the United States, a mining claim located on such land is properly declared null and void ab initio because the United States does not own the mineral deposits in the lands.

August F. Plachta, 88 IBLA 304 (Sept. 16, 1985)

SUITS TO CANCEL

The Department is barred by the provisions of 43 U.S.C. § 1166 (1982) from challenging the conveyance of land to the State of Alaska by sec. 906 of the Alaska National Interest Lands Conservation Act, confirming tentative approvals of State land selections subject to valid rights, where more than 6 years have passed since the conveyance. Since the lands here conveyed legislatively to the State were tentatively approved for conveyance in 1976, and since the Act

PATENTS OF PUBLIC LANDS--Continued

SUITS TO CANCEL--Continued

makes such conveyance effective as of the date of tentative approval, provision of 43 U.S.C. § 1166 (1982) bars any possibility of Departmental intervention on behalf of the entryman in this case.

Terry L. Wilson, 85 IBLA 206 (Feb. 28, 1985)
92 I.D. 109

PAYMENTS

GENERALLY

"Tender." Placing a check for annual rental for oil and gas leases in the mails does not constitute a tender of payment within the meaning of 43 CFR 3108.2-1(c). A tender of rental payment is made only when a lessee submits payment to the BLM office administering his lease, providing BLM with the opportunity either to receive or decline payment. Accordingly, placing rental in the mails does not constitute a tender of payment which would allow the Department to consider the merits of a petition for a class I reinstatement of an oil and gas lease.

William E. Phalen, 85 IBLA 151 (Feb. 25, 1985)

POWERSITE LANDS

It is error to prohibit placer mining on powersite lands pursuant to the Act of Aug. 11, 1955, merely on the basis that unrestricted and unmitigated mining operations will adversely affect other land uses or values, because (1) there no longer can be unrestricted or unmitigated placer mining on such claims, and (2) all land has some other use or value which would be affected by mining, so that prohibition for that reason would foreclose mining on all powersite lands and effectively nullify the Act. Whether to allow or prohibit mining requires an evaluation of potential detriments and benefits in each specific case, bearing in mind that Congress generally intended that powersite lands would be open to placer location and operation.

United States Forest Service v. Walter D. Milender, 86 IBLA 181 (Apr. 30, 1985) 92 I.D. 175

PRACTICE BEFORE THE DEPARTMENT

GENERALLY

An appeal brought by a person who does not fall within any of the categories of persons authorized by regulation to practice before the Department is subject to dismissal. Where the record does not show the party presenting the appeal is qualified under the regulations, the appeal will be dismissed.

Robert G. Young, 87 IBLA 249 (June 20, 1985)

PERSONS QUALIFIED TO PRACTICE

An appeal brought by a person who does not fall within the categories of persons authorized by regulation to practice before the Department is subject to dismissal.

Ganawas Corp., 85 IBLA 250 (Mar. 6, 1985)

PRIVATE EXCHANGES

PROTESTS

Where the record in a private exchange case reflects that BLM considered the wildlife values of the public lands subject to exchange and determined them to be not significant, a claim that such lands are of critical importance to wildlife cannot be sustained where there is a failure to provide persuasive evidence that BLM's analysis of the wildlife values is improper.

The denial of a protest to a private land exchange will be upheld where BLM determines that the public interest is well served by proceeding with the exchange and the protestant fails to show BLM erred in that determination.

Where the Environmental Assessment/Land Report of a private land exchange reflects that BLM considered the alternative of imposing a conservation easement or land use covenant to protect wildlife values on the public land subject to exchange, but BLM's analysis results in the conclusion that such a restriction is not warranted, such a determination will not be overturned in the absence of a showing of error.

Nat'l Wildlife Federation et al., 87 IBLA 271 (June 25, 1985)

Where BLM denies a protest to a proposed private land exchange, it must inform the protestant of its right to appeal. The right of appeal is not dependent upon BLM's determination of whether the protestant claims ownership of public lands in the proposal or holds a valid existing contract, permit or lease for those lands. Denial of a protest makes the protestant a "party to a case" within the meaning of 43 CFR 4.410. Whether a party to a case has an interest which has been adversely affected by the BLM decision is a matter to be decided by the Board of Land Appeals on appeal.

Where BLM denies a request by a private land owner for access across Federal lands selected in a private exchange proposal on the basis that historical access to the private lands has been across other private lands not associated with the exchange and that the requested access would provide no public benefit, such a determination will be upheld where the one seeking access fails to establish error in the BLM determination.

Steinheimer Trust, 87 IBLA 308 (June 25, 1985)

PUBLIC INTEREST

The denial of a protest to a private land exchange will be upheld where BLM determines that the public interest is well served by proceeding with the exchange and the protestant fails to show BLM erred in that determination.

Nat'l Wildlife Federation et al., 87 IBLA 271 (June 25, 1985)

PUBLIC LANDS

CLASSIFICATION

Where a lode mining claim is located partially on withdrawn or patented land, it is not null and void ab initio to the extent of its inclusion of such lands. A locator whose discovery is on lands open to location may extend the end lines and side lines of his claim

PUBLIC LANDS--Continued

CLASSIFICATION--Continued

across withdrawn or patented land to define the extralateral rights to lodes or veins which apex within the claim.

Timberline Mining Co., 87 IBLA 264 (June 24, 1985)

JURISDICTION OVER

BLM has the authority to decide whether to issue a noncompetitive geothermal resources lease pursuant to sec. 3 of the Geothermal Steam Act of 1970, 30 U.S.C. § 1002 (1982), for land within a national forest where the Forest Service has consented to leasing, and to impose additional stipulations, in order to protect environmental resources, not inconsistent with those prescribed by the Forest Service. Where BLM has expressly not exercised that authority, the case will be remanded for that purpose, including a consideration of whether BLM has properly provided for staged leasing, i.e., leasing subject to subsequent approval of specific development activities contingent on a finding that no environmentally unacceptable impact will occur.

Sierra Club, Oregon Chapter, 87 IBLA 1 (May 17, 1985)

BLM has the authority to issue notices of incidents of noncompliance, e.g., for failure to regravel an access road and to remove reserve pit fluids, and to levy an assessment under 43 CFR 3163.3 (1983) with respect to the operation of oil and gas wells on Federal noncompetitive oil and gas leases within a national forest.

Riviera Drilling & Exploration, 87 IBLA 357 (June 27, 1985)

LEASES AND PERMITS

BLM has the authority to issue notices of incidents of noncompliance, e.g., for failure to regravel an access road and to remove reserve pit fluids, and to levy an assessment under 43 CFR 3163.3 (1983) with respect to the operation of oil and gas wells on Federal noncompetitive oil and gas leases within a national forest.

Riviera Drilling & Exploration, 87 IBLA 357 (June 27, 1985)

PUBLIC SALES

GENERALLY

Where in 1964 a tract of public land was offered for public sale pursuant to 43 U.S.C. § 1171 and the adjacent landowners were declared the purchasers, but the sale was subsequently vacated and all money reimbursed by a decision which afforded them the right of appeal, and where no appeal was taken and 43 U.S.C. § 1171 was thereafter repealed, the decision became final and no residual rights under that sale or the repealed statute survived. Therefore, a protest by these same landowners against the re-offering of this tract for sale pursuant to 43 U.S.C. § 1713, based on their asserted priority at the 1964 sale, is properly dismissed.

George Henke, Beatrice Henke, 87 IBLA 81 (May 29, 1985)

PUBLIC SALES--Continued

CANCELLATION

Where in 1964 a tract of public land was offered for public sale pursuant to 43 U.S.C. § 1171 and the adjacent landowners were declared the purchasers, but the sale was subsequently vacated and all money reimbursed by a decision which afforded them the right of appeal, and where no appeal was taken and 43 U.S.C. § 1171 was thereafter repealed, the decision became final and no residual rights under that sale or the repealed statute survived. Therefore, a protest by these same landowners against the re-offering of this tract for sale pursuant to 43 U.S.C. § 1713, based on their asserted priority at the 1964 sale, is properly dismissed.

George Henke, Beatrice Henke, 87 IBLA 81 (May 29, 1985)

RAILROAD GRANT LANDS

Language excluding mineral lands which was included in a patent of railroad grant lands does not operate as a mineral reservation or diminish the estate vested in the grantee upon later discovery of minerals in the land. The issuance of a railroad grant lands patent generally constitutes a conclusive determination by the United States of the nonmineral character of the land.

August F. Flachta, 88 IBLA 304 (Sept. 16, 1985)

RECLAMATION LANDS

GENERALLY

Ordinarily an application to restore lands within a reclamation withdrawal to mineral entry pursuant to the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982), will be rejected by the Bureau of Land Management where the Bureau of Reclamation recommends against restoration. However, on appeal a case may be remanded for further consideration by the appropriate agencies, including preparation of a mineral report, where it appears warranted by the appellant's showings and willingness to accept terms and conditions to protect the Government's interest.

Robert Limbert, Otis Schoolcraft, 85 IBLA 131 (Feb. 19, 1985)

RECREATION AND PUBLIC PURPOSES ACT

Where a cemetery site is to be conveyed to a city, an appropriate purchase price must be paid in consideration. Although once a military cemetery, the site may not be conveyed without monetary consideration as a historic monument where the military dead have been removed and the city intends to continue to utilize it as it has been used for decades, as a typical civilian community cemetery for the benefit of residents.

City of Eagle, Alaska, 87 IBLA 323 (June 26, 1985)

REGULATIONS

GENERALLY

Written statements concerning public lands, e.g., proof of improvements of mining claims and proof of posting of notices, need not be sworn statements unless the Secretary in his discretion shall so require.

Dennis J. Kitts, 84 IBLA 338 (Jan. 15, 1985)

While, as a general rule, amendments to regulations or administrative procedures may be applied to a pending appeal where to do so would benefit an appellant, such amended regulations or procedures may not be applied where third-party rights would be adversely affected.

United States v. Richard R. Ballas, 87 IBLA 88 (May 30, 1985)

An essential element of a claim for estoppel is that the party asserting it must be ignorant of the true facts. Since, however, all persons are presumed to have knowledge of relevant statutory and regulatory provisions, an individual may not premise a claim of estoppel on information or advice contrary to such a provision.

Marion E. Banks, Noble Craver, & August Carniglia, 88 IBLA 341 (Sept. 19, 1985)

FORCE AND EFFECT AS LAW

The Board of Land Appeals has no authority to treat as insignificant or to declare invalid duly promulgated regulations of the Department. Such regulations have the force and effect of law and are binding on the Department.

Kuugpik Corp., 85 IBLA 366 (Mar. 26, 1985)

The Board of Land Appeals has no authority to declare invalid duly promulgated regulations of this Department. Such regulations have the force and effect of law and are binding on the Department.

Wisenak, Inc., 87 IBLA 67 (May 28, 1985)

The Board of Land Appeals has no authority to declare invalid duly promulgated regulations of this Department. Such regulations have the force and effect of law and are binding on the Department.

Ahtna, Inc., 87 IBLA 283 (June 25, 1985)

VALIDITY

The Board of Indian Appeals does not have authority to change a duly promulgated regulation of the Department or to declare it to be invalid.

Harold Jones v. Acting Area Director, Sacramento Area Office, Bureau of Indian Affairs, 13 IBIA 124 (Feb. 27, 1985)

REGULATIONS--Continued

VALIDITY--Continued

The Board of Land Appeals has no authority to treat as insignificant or to declare invalid duly promulgated regulations of the Department. Such regulations have the force and effect of law and are binding on the Department.

Kuugpik Corp., 85 IBLA 366 (Mar. 26, 1985)

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Wisenak, Inc., 87 IBLA 67 (May 28, 1985)

The Board of Land Appeals has no authority to declare invalid duly promulgated regulations of this Department. Such regulations have the force and effect of law and are binding on the Department.

Ahtna, Inc., 87 IBLA 283 (June 25, 1985)

The Board of Land Appeals has no authority to declare duly promulgated regulations invalid. Such regulations have the force and effect of law, are binding on the Department, and may not be waived.

Robert R. Perry, 87 IBLA 380 (June 28, 1985)

WAIVER

The requirement that a bidder in a competitive oil and gas lease sale must submit one-fifth of the bid amount with his bid is mandatory and will not be waived.

Dolton H. Simmons, 85 IBLA 297 (Mar. 13, 1985)

The Board of Land Appeals has no authority to declare duly promulgated regulations invalid. Such regulations have the force and effect of law, are binding on the Department, and may not be waived.

Robert R. Perry, 87 IBLA 380 (June 28, 1985)

RENT

Where the reasonable rental value of Government-furnished quarters has been determined in accordance with accepted appraisal procedures pursuant to Departmental directives, and the occupant alleges that his rent is excessive, the burden is on the occupant to prove by positive, specific, and substantial evidence that the appraisal is in error.

Appeal of James F. Glynn, 6 OHA 13 (Feb. 6, 1985)

Where the record indicates full compliance with an earlier decision of this Board involving the same parties and issues, and the only remaining complaint is the fact that no meetings with appellants were held, the appeal will be denied; no such meetings are mandated by 41 CFR 102.7. See 4 CFR 101.8.

Appeal of Henry Mountain Resource Area Employees, II, 6 OHA 80 (Sept. 9, 1985)

RES JUDICATA

An appeal contesting appellant's responsibility for repainting doors and jambs under a contract terminated for default is dismissed because the same issues were presented and decided in an earlier decision and affirmed on reconsideration, thereby constituting res judicata.

Appeal of C. G. Norton Co., Inc., IBCA-1823 (Jan. 10, 1985) 92 I.D. 56

Where an appeal has previously been taken and a final Departmental decision announced, the doctrine of administrative finality bars consideration of a new appeal arising from a later proceeding involving the same claim and issues, absent compelling legal or equitable reasons for reconsideration.

Village of South Naknek, 85 IBLA 74 (Feb. 11, 1985)

RIGHTS-OF-WAY

GENERALLY

Where the State of Alaska appeals a decision holding that a Native allotment is not subject to a right-of-way granted to the State and on appeal the heirs of the allottee relinquish that part of the allotment in conflict with the right-of-way, the issue is moot and the appeal is dismissed.

State of Alaska, 85 IBLA 170 (Feb. 26, 1985)

ACT OF MARCH 3, 1891

BLM may properly cancel a right-of-way granted pursuant to the Act of Mar. 3, 1891, 43 U.S.C. § 946 (1970), for violation of the terms of the grant where the grantee has failed to file proof of construction, has failed to maintain a fence around the pump site (including the planting of vines thereon to screen the fence), and has failed to maintain a performance bond pending acceptance of proof of construction. Such cancellation may be effected without a hearing where no material factual issue is in dispute.

James L. Morrison Sr., et al., 87 IBLA 236 (June 19, 1985)

ACT OF FEBRUARY 15, 1901

A right-of-way issued under the Act of Feb. 15, 1901, for a dike system is properly revoked as an exercise of the discretion of BLM where the holder fails for over 15 years to develop it, in violation of an express condition in the right-of-way imposing a deadline for completion of development, and where BLM wishes to remove encumbrances on title to the subject lands to allow consummation of a land exchange to protect the habitat of a threatened animal species.

Coachella Valley Water District, 85 IBLA 389 (Mar. 27, 1985)

ACT OF FEBRUARY 25, 1920

The Department has discretionary authority to issue a natural gas pipeline right-of-way pursuant to 30 U.S.C. § 185 (1982). A decision to issue a right-of-way in the public interest to facilitate production of gas from Federal oil and gas leases and to dismiss the protest of a competing gas supplier will be

RIGHTS-OF-WAY--Continued

ACT OF FEBRUARY 25, 1920--Continued

affirmed in the absence of a showing of violation of relevant statutes or regulations.

Western Gas Supply Co., 86 IBLA 258 (May 8, 1985)

Where the Bureau of Land Management proposes to resolve the conflicts and inconsistencies in its appraisal method used to determine fair market rental values for natural gas pipeline rights-of-way, granted pursuant to the Act of Feb. 25, 1920, as amended, 30 U.S.C. § 185 (1982), the Board will set aside decisions based on the going rate method of appraisal, and remand such questions to the Bureau of Land Management for further action consistent with the result of BLM's analysis.

An oil and gas lease issued pursuant to the Act of Feb. 25, 1920, 30 U.S.C. § 181 (1982), grants to the lessee no rights in lands outside the subdivisions described in the lease. Off-lease facilities on Federal lands, regardless of their nature, on-lease oil and gas transportation facilities, and on-lease commercial facilities may be constructed only after an appropriate right-of-way has been granted. Sec. 28 of the Act, 30 U.S.C. § 185 (1982), does not apply to on-lease production facilities which are included in a surface use and operations plan, and which are authorized by the approval of an application to conduct leasehold operations or construction activities, such as an application for permit to drill. However, where on-lease gathering facilities are constructed by an individual who is neither the lessee nor the operator, such activities constitute "commercial operations" and are permissible only after obtaining a right-of-way under sec. 28.

No authority exists in either sec. 28 of the Act of Feb. 25, 1920, 30 U.S.C. § 185 (1982), or in the regulations issued thereunder to support a request that BLM refrain from collecting 6 years of back use charges for the unauthorized use of rights-of-way on the Federal lands.

BLM's right to reappraise every 5 years a right-of-way issued pursuant to sec. 28 of the Act of Feb. 25, 1920, 30 U.S.C. § 185 (1982), is but one factor that BLM has considered in arriving at an adjusted going rate for BLM rights-of-way. BLM's adjusted going rate is calculated by reducing by 30 percent the industry going rate for rights-of-way on private lands.

Gas Co. of New Mexico, 88 IBLA 240 (Sept. 3, 1985)

APPLICATIONS

Under the Federal Land Policy and Management Act of 1976, approval of a right-of-way by the Secretary of the Interior is discretionary. A decision of the Bureau of Land Management rejecting an application for a right-of-way will ordinarily be affirmed by this Board when the record shows the decision is based on a reasoned analysis of the factors involved, made with due regard for the public interest.

High Summit Oil & Gas, Inc., 84 IBLA 359 (Jan. 24, 1985) 92 I.D. 58

In adjudicating a protest against an application for radio communications right-of-way, the Bureau of Land Management is required by 43 CFR 4.450-2 only to consider and decide matters which are proposed to be done. Where an application for right-of-way has already matured into a functioning use, a protest

RIGHTS-OF-WAY--Continued

APPLICATIONS--Continued

against the proposal upon which the use was initiated must be dismissed.

Willamette Logging Communications, Inc., Springfield Radio Communications, Inc., 86 IBLA 77 (Apr. 10, 1985)

A Bureau of Land Management decision rejecting a right-of-way application for a road filed pursuant to sec. 501(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761(a) (1982), will be affirmed when the record shows the decision to be a reasoned analysis of the factors involved, made with due regard for the public interest.

Dwane Thompson, 88 IBLA 31 (July 9, 1985)

CANCELLATION

A right-of-way for an electric transmission line issued pursuant to the Act of Mar. 4, 1911, over lands to which, at the time of issuance, an Alaska Native had an inchoate right through use and occupancy, cannot be defeated by subsequent determination of entitlement to an allotment for such lands, and the allotment must be made subject to the right-of-way. A decision holding such a right-of-way null and void must be reversed.

Golden Valley Electric Ass'n, 85 IBLA 363 (Mar. 25, 1985)

A right-of-way issued under the Act of Feb. 15, 1901, for a dike system is properly revoked as an exercise of the discretion of BLM where the holder fails for over 15 years to develop it, in violation of an express condition in the right-of-way imposing a deadline for completion of development, and where BLM wishes to remove encumbrances on title to the subject lands to allow consummation of a land exchange to protect the habitat of a threatened animal species.

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BLM may properly cancel a right-of-way granted pursuant to the Act of Mar. 3, 1891, 43 U.S.C. § 946 (1970), for violation of the terms of the grant where the grantee has failed to file proof of construction, has failed to maintain a fence around the pump site (including the planting of vines thereon to screen the fence), and has failed to maintain a performance bond pending acceptance of proof of construction. Such cancellation may be effected without a hearing where no material factual issue is in dispute.

James L. Morrison Sr. et al., 87 IBLA 236 (June 19, 1985)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976

Under the Federal Land Policy and Management Act of 1976, approval of a right-of-way by the Secretary of the Interior is discretionary. A decision of the Bureau of Land Management rejecting an application for a right-of-way will ordinarily be affirmed by this Board when the record shows the decision is based on a reasoned analysis of the factors involved, made with due regard for the public interest.

High Summit Oil & Gas, Inc., 84 IBLA 359 (Jan. 24, 1985) 92 I.D. 58

RIGHTS-OF-WAY--Continued

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

A Bureau of Land Management decision rejecting a right-of-way application for a road filed pursuant to sec. 501(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761(a) (1982), will be affirmed when the record shows the decision to be a reasoned analysis of the factors involved, made with due regard for the public interest.

Dwane Thompson, 88 IBLA 31 (July 9, 1985)

NATURE OF INTEREST GRANTED

A right-of-way for an electric transmission line issued pursuant to the Act of Mar. 4, 1911, over lands to which, at the time of issuance, an Alaska Native had an inchoate right through use and occupancy, cannot be defeated by subsequent determination of entitlement to an allotment for such lands, and the allotment must be made subject to the right-of-way. A decision holding such a right-of-way null and void must be reversed.

Golden Valley Electric Ass'n, 85 IBLA 363 (Mar. 25, 1985)

OIL AND GAS PIPELINES

The Department has discretionary authority to issue a natural gas pipeline right-of-way pursuant to 30 U.S.C. § 185 (1982). A decision to issue a right-of-way in the public interest to facilitate production of gas from Federal oil and gas leases and to dismiss the protest of a competing gas supplier will be affirmed in the absence of a showing of violation of relevant statutes or regulations.

Western Gas Supply Co., 86 IBLA 258 (May 8, 1985)

Where the Bureau of Land Management proposes to resolve the conflicts and inconsistencies in its appraisal method used to determine fair market rental values for natural gas pipeline rights-of-way, granted pursuant to the Act of Feb. 25, 1920, as amended, 30 U.S.C. § 185 (1982), the Board will set aside decisions based on the going rate method of appraisal, and remand such questions to the Bureau of Land Management for further action consistent with the result of BLM's analysis.

An oil and gas lease issued pursuant to the Act of Feb. 25, 1920, 30 U.S.C. § 181 (1982), grants to the lessee no rights in lands outside the subdivisions described in the lease. Off-lease facilities on Federal lands, regardless of their nature, on-lease oil and gas transportation facilities, and on-lease commercial facilities may be constructed only after an appropriate right-of-way has been granted. Sec. 28 of the Act, 30 U.S.C. § 185 (1982), does not apply to on-lease production facilities which are included in a surface use and operations plan, and which are authorized by the approval of an application to conduct leasehold operations or construction activities, such as an application for permit to drill. However, where on-lease gathering facilities are constructed by an individual who is neither the lessee nor the operator, such activities constitute "commercial operations" and are permissible only after obtaining a right-of-way under sec. 28.

No authority exists in either sec. 28 of the Act of Feb. 25, 1920, 30 U.S.C. § 185 (1982), or in the regulations issued thereunder to support a request that BLM refrain from collecting 6 years of back use charges for the unauthorized use of rights-of-way on the Federal lands.

BLM's right to reappraise every 5 years a right-of-way issued pursuant to sec. 28 of the Act of

RIGHTS-OF-WAY--Continued

OIL AND GAS PIPELINES--Continued

Feb. 25, 1920, 30 U.S.C. § 185 (1982), is but one factor that BLM has considered in arriving at an adjusted going rate for BLM rights-of-way. BLM's adjusted going rate is calculated by reducing by 30 percent the industry going rate for rights-of-way on private lands.

Gas Co. of New Mexico, 88 IBLA 240 (Sept. 3, 1985)

RULES OF PRACTICE

APPEALS

Generally

A protest within the meaning of 43 CFR 4.450-2 is an objection "to any action proposed to be taken" in any proceeding before the Bureau of Land Management. A protest to the issuance of an oil and gas lease filed after the lease has issued by one not previously a party to the case is not timely, and dismissal of such a protest will be affirmed on appeal.

Sierra Club Legal Defense Fund, Inc., Natural Resources Defense Council, Inc., California Wilderness Coalition, 84 IBLA 311 (Jan. 7, 1985) 92 I.D. 37

Where, on appeal from rejection by BLM of a Native allotment application pursuant to an adjudication, precipitated only by the filing of a State protest in accordance with sec. 905(a) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a) (1982), the State withdraws its protest in a stipulation agreed to by all parties, the Board will vacate the decision appealed from and remand the case to BLM with instructions to hold the application for approval under the statute.

Luke F. Kagak, 84 IBLA 350 (Jan. 17, 1985)

Where on appeal from a decision rejecting a desert land entry application because the applicant has failed to show that appropriate steps have been taken to acquire a water right, the applicant subsequently clarifies his intent such that a sufficient water right might be available, the decision rejecting the application will be set aside and the case file will be remanded to permit reconsideration of the application.

Silvita S. Rouseau, 85 IBLA 46 (Feb. 5, 1985)

Where an appeal has previously been taken and a final Departmental decision announced, the doctrine of administrative finality bars consideration of a new appeal arising from a later proceeding involving the same claim and issues, absent compelling legal or equitable reasons for reconsideration.

Village of South Naknek, 85 IBLA 74 (Feb. 11, 1985)

Under 43 CFR 4.1271(a), a party may not file a "notice of appeal" with the Board of Land Appeals from an order or decision of an Administrative Law Judge disposing of a civil penalty proceeding. Instead, any party seeking review of an order or decision in a civil penalty proceeding may file a petition for discretionary review with the Board under 43 CFR 4.1158 and 4.1270.

Tri Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 85 IBLA 146 (Feb. 21, 1985)

RULES OF PRACTICE--Continued

APPEALS--Continued

Generally--Continued

As an appellate tribunal, the Board of Land Appeals may not make initial adjudicatory decisions on matters which should properly be submitted to and decided by BLM, nor does the Board render advisory opinions.

Edgar W. White, 85 IBLA 161 (Feb. 25, 1985)

As an appellate tribunal, the Board of Land Appeals may not make initial adjudicatory decisions on matters which properly should be submitted to and decided by BLM, nor does the Board render advisory opinions or opinions in hypothetical cases.

State of Alaska, 85 IBLA 170 (Feb. 26, 1985)

Where a mining claimant appeals from an Administrative Law Judge's decision holding his claims invalid and makes vague assertions that prejudicial evidence was admitted at the hearing; that his expert witness was not permitted to testify that the claims could be mined profitably; and that the transcript was inadequate and incorrect, but offers no evidence to substantiate the assertions, such assertions will not serve as a basis for setting aside the Judge's decision.

United States v. Clyde L. Weekley, 86 IBLA 1 (Mar. 29, 1985)

A decision denying a protest of the contemplated issuance of noncompetitive geothermal resources leases will not be effective during the period of time in which the protestant adversely affected by the decision may file a notice of appeal, and leases issued during this time are subject to cancellation.

Sierra Club, Oregon Chapter, 87 IBLA 1 (May 17, 1985)

In an appeal arising from a decision by an Administrative Law Judge, the Board of Land Appeals may make findings of fact and conclusions based upon the record on appeal. The entire record before the Board may be considered in determining whether the decision appealed from is in error, and an appropriate order entered.

Bureau of Land Management v. David & Bonnie Ericsson, 88 IBLA 248 (Sept. 4, 1985)

Burden of Proof

An appeal from a termination for default and an assessment of excess costs is denied where the Board finds (i) that a preliminary inspection of hay incident to a preaward survey did not preclude the Government from rejecting a substantial portion of the same hay when delivered to the destination specified in the solicitation; (ii) that the contract was properly terminated for default when the contractor failed to deliver the required quantity of acceptable hay within the time specified; and (iii) that the amount of excess costs involved in reprocuring the hay from another source was reasonable.

Appeal of Malheur Lake Farms, Inc., IBCA-1808 (Jan. 28, 1985) 92 I.D. 63

RULES OF PRACTICE--Continued

APPEALS--Continued

Burden of Proof--Continued

Where the reasonable rental value of Government-furnished quarters has been determined in accordance with accepted appraisal procedures pursuant to Departmental directives, and the occupant alleges that his rent is excessive, the burden is on the occupant to prove by positive, specific, and substantial evidence that the appraisal is in error.

Appeal of James P. Glynn, 6 OHA 13 (Feb. 6, 1985)

Where the Board has referred a high-bid rejection dispute under a geothermal resources lease sale to the Hearings Division for an evidentiary hearing and decision by an Administrative Law Judge, the appropriate standard of proof is that appellant show by a preponderance of the evidence that BLM's action was improper.

California Energy Co. (On Reconsideration), 85 IBLA 254 (Mar. 6, 1985) 92 I.D. 125

A claim for additional compensation based upon a claim of defective specifications is denied where the subcontractor prosecuting the appeal fails to show (i) that the Government made any attempt to enforce a particular specification provision at the station where the disputed work was performed or (ii) that the difficulties encountered in drilling holes for and installing instrumentation in the foundation of an earth-filled dam were attributable to defective specifications rather than to the failure of the prime contractor to properly coordinate the contract work.

Appeal of Industrial Constructors, Inc., IBCA-1831 (Mar. 26, 1985) 92 I.D. 146

An appeal under a timber sales contract is granted where the Board finds a contractor to have been relieved of his slash burning obligations by reason of the Government having improperly deferred the burning of the slash generated under appellant's contract until such slash could be burned simultaneously with slash generated under another timber sales contract awarded at a later date to someone else.

Appeal of James L. Patten d.b.a. James Patten Logging, IBCA-1873 (Apr. 29, 1985) 92 I.D. 172

Where a party appeals the BLM issuance of special recreation use permits, it is the obligation of appellant to show that the determinations to issue the permits are erroneous. Unless a statement of reasons shows adequate basis for appeal and the allegations are supported with evidence showing error, the appeals cannot be afforded favorable consideration.

Mendocino County Tax-Payers Land Use Committee, 86 IBLA 319 (May 16, 1985)

A termination for default is sustained where the Board finds (i) that neither a written nor an oral request for a time extension was made during the performance of the contract; (ii) that the appellant failed to establish any of the assigned causes of delay as excusable; and (iii) that the contractor repudiated his obligation to proceed with the performance of the contract prior to its completion.

Appeal of Timberland Management, IBCA-1877 (July 31, 1985) 92 I.D. 340

RULES OF PRACTICE--Continued

APPEALS--Continued

Burden of Proof--Continued

The burden of proof is on an appellant to show error in the decision appealed from and, in the absence of such a showing, the decision will be affirmed.

Wells J. Horvereid, 88 IBLA 345 (Sept. 24, 1985)

Dismissal

Where the State of Alaska appeals a decision holding that a Native allotment is not subject to a right-of-way granted to the State and on appeal the heirs of the allottee relinquish that part of the allotment in conflict with the right-of-way, the issue is moot and the appeal is dismissed.

State of Alaska, 85 IBLA 170 (Feb. 26, 1985)

The holder of a right-of-way on lands administered by the Bureau of Land Management is not adversely affected within the meaning of 43 CFR 4.410 by a decision transferring administrative authority over such lands to the Forest Service in the absence of any allegations of facts showing that the Forest Service has taken any adverse action with respect to the right-of-way at issue.

James W. Smith, 85 IBLA 237 (Mar. 4, 1985)

An appeal brought by a person who does not fall within the categories of persons authorized by regulation to practice before the Department is subject to dismissal.

Ganavas Corp., 85 IBLA 250 (Mar. 6, 1985)

Where, on appeal from a denial of a protest, an appellant fails to make any showing as to how its interests are adversely affected by the denial of the protest, and none is apparent, such an appellant will be deemed to lack standing, and the appeal will be dismissed.

Save Our ecoSystems, Inc., et al., 85 IBLA 300 (Mar. 15, 1985)

Where the Forest Service, U.S. Department of Agriculture, determines that national forest lands applied for as an Indian allotment under 25 U.S.C. § 337 (1982) are more valuable for the timber found thereon than for agricultural or grazing purposes and accordingly rejects the allotment, the allotment applicant has no right of appeal to the Interior Board of Land Appeals but rather must appeal such a determination within the Department of Agriculture.

James R. Hensher et al., 85 IBLA 343 (Mar. 22, 1985) 92 I.D. 140

Notice of appeal must be filed within 30 days after the person taking the appeal is served with the decision from which the appeal is taken. The timely filing of a notice of appeal is jurisdictional and failure to file the appeal within the time allowed requires dismissal of the appeal.

Oscar Mineral Group #3, 87 IBLA 48 (May 23, 1985)

RULES OF PRACTICE--Continued

APPEALS--Continued

Dismissal--Continued

Where the Board found that the Government had failed to show prejudice from delays resulting in part from its own participation in requests and a stipulation for postponement, all in anticipation of amicable settlement of the claims involved, the Government's motion to dismiss for lack of prosecution was denied.

Appeals of Whitesell-Green, Inc., IBCA-1927 - 1940 (June 13, 1985) 92 I.D. 263

An appeal brought by a person who does not fall within any of the categories of persons authorized by regulation to practice before the Department is subject to dismissal. Where the record does not show the party presenting the appeal is qualified under the regulations, the appeal will be dismissed.

Robert G. Young, 87 IBLA 249 (June 20, 1985)

An appeal to the Board of Land Appeals of a decision by the Director, Bureau of Land Management, affirming a regional conservation manager's decision not to approve a unit agreement will be dismissed as moot where the noncompetitive oil and gas leases proposed for inclusion in the unit have expired by the running of their primary terms without benefit of development or production. Delays by the Department in considering an appeal pursuant to 30 CFR Part 290 of the conservation manager's decision do not constitute a de facto suspension of the oil and gas leases proposed for the unit which would extend the leases.

Jack J. Grynberg, 88 IBLA 330 (Sept. 19, 1985)

Effect of

The Office of Surface Mining Reclamation and Enforcement may not vacate a notice of violation while an application for review of the notice of violation is pending before an Administrative Law Judge. When an application for review is timely filed, jurisdiction over the subject matter is lodged in the reviewing official or tribunal, and only that official or tribunal has the authority to vacate the notice of violation.

Gateway Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 84 IBLA 371 (Jan. 25, 1985)

A decision denying a protest of the contemplated issuance of noncompetitive geothermal resources leases will not be effective during the period of time in which the protestant adversely affected by the decision may file a notice of appeal, and leases issued during this time are subject to cancellation.

Sierra Club, Oregon Chapter, 87 IBLA 1 (May 17, 1985)

Failure to Appeal

Where in 1964 a tract of public land was offered for public sale pursuant to 43 U.S.C. § 1171 and the adjacent landowners were declared the purchasers, but the sale was subsequently vacated and all money reimbursed by a decision which afforded them the right of appeal, and where no appeal was taken and 43 U.S.C. § 1171 was thereafter repealed, the decision became final and no residual rights under that sale or the repealed statute survived. Therefore, a protest by these same landowners against the re-offering of this

RULES OF PRACTICE--Continued

APPEALS--Continued

Failure to Appeal--Continued

tract for sale pursuant to 43 U.S.C. § 1713, based on their asserted priority at the 1964 sale, is properly dismissed.

George Henke, Beatrice Henke, 87 IBLA 81 (May 29, 1985)

Where, following a contest hearing, certain mining claims are declared null and void for lack of discovery of a valuable mineral deposit and the claimant fails to appeal and, in essence, acquiesces in the decision over a long period of time, mining claim recordation filings for the same claims are properly rejected.

Emma Grace Lowe, 87 IBLA 207 (June 18, 1985)

Hearings

Where BLM has issued a decision which levied an assessment for noncompliance with a previous order with respect to the operation of oil and gas wells on noncompetitive oil and gas leases and has afforded the lessee a technical and procedural review in accordance with 43 CFR 3165.3, the decision of that official is binding.

Riviera Drilling & Exploration, 87 IBLA 357 (June 27, 1985)

A Government motion for summary judgment is denied where the Board finds that the defense of duress interposed by the appellant to the default termination of its contract will require the resolution of disputed questions of material fact and that the appellant is therefore entitled to the oral hearing it has requested.

Appeal of Pearson Machine Controls, Inc., IBCA-1959 (July 31, 1985) 92 I.D. 350

Motions

A Government motion for summary judgment is denied where the Board finds that the defense of duress interposed by the appellant to the default termination of its contract will require the resolution of disputed questions of material fact and that the appellant is therefore entitled to the oral hearing it has requested.

Appeal of Pearson Machine Controls, Inc., IBCA-1959 (July 31, 1985) 92 I.D. 350

Cross motions for summary judgment are denied where the Board finds appellant's claim of a new valid and consummated agreement will require the resolution of disputed questions of material fact in a hearing ordered by the Board.

Appeal of Maxima Corp., IBCA-1828 (Sept. 10, 1985) 92 I.D. 378

Notice of Appeal

Where a decision of a state office prematurely rejects an oil and gas lease offer before the expiration of a period of time granted to the offeror to submit various documents, the rejection effectively suspends the running of the time for compliance, and where an appeal is timely taken from such a premature rejection and the documents in question are submitted

RULES OF PRACTICE--Continued

APPEALS--Continued

Notice of Appeal--Continued

during the pendency of the appeal, the submission will be considered timely.

American Petrofina Co. of Texas, 85 IBLA 104 (Feb. 14, 1985)

Neither actual nor constructive notice of a Departmental decision is accomplished by an attempted service using certified mail where the delivering post office returns the decision to the Department after 7 days and it affirmatively appears that the addressee had not moved nor refused delivery, and the address used was his address of record.

While 43 U.S.C. § 1165 (1982) provides for issuance of a patent to an entryman upon a 2-year lapse following issuance of "receipt" when no contest is then pending, the statutory 2-year period does not begin to run at the time the entryman files his final proof, but begins only upon payment for the land. Where appellant had not paid for the land sought to be patented, but had only paid fees associated with filing his homestead entry, he was not entitled to patent.

Terry L. Wilson, 85 IBLA 206 (Feb. 28, 1985)
92 I.D. 109

Reconsideration

The Board's principal decision, which denied claims for constructive changes and costs of extended performance for failure to sustain the burden of proving the claims, is now affirmed after oral argument. Further review of the record confirms that the documentary evidence, the testimony at the hearing, and legal arguments fail to show liability of the Government for appellant's excess costs and extended performance.

Appeal of Kirkpatrick Div., Paul N. Howard Co., IECA-1520-10-81 (Mar. 5, 1985)

Standing to Appeal

Where state selection applications were rejected by decisions approving conflicting Native allotment applications, the State of Alaska has standing to appeal those decisions to the Board of Land Appeals.

State of Alaska, 85 IBLA 196 (Feb. 27, 1985)

The holder of a right-of-way on lands administered by the Bureau of Land Management is not adversely affected within the meaning of 43 CFR 4.410 by a decision transferring administrative authority over such lands to the Forest Service in the absence of any allegations of facts showing that the Forest Service has taken any adverse action with respect to the right-of-way at issue.

James W. Smith, 85 IBLA 237 (Mar. 4, 1985)

Regulation 43 CFR 4.410, setting forth the standard regarding who may appeal to the Board of Land Appeals, contains two separate and discrete prerequisites: (1) that appellant be a party to the case, and (2) that appellant be adversely affected by the decision on appeal. Denial of a protest makes an individual a party to a case. Such denial, however, does not necessarily establish that an individual is adversely affected. Rather, an unsuccessful protestant

RULES OF PRACTICE--Continued

APPEALS--Continued

Standing to Appeal--Continued

must show that a legally cognizable interest has been adversely affected by denial of the protest.

Donald Pay, 85 IBLA 283 (Mar. 13, 1985)

Where, on appeal from a denial of a protest, an appellant fails to make any showing as to how its interests are adversely affected by the denial of the protest, and none is apparent, such an appellant will be deemed to lack standing, and the appeal will be dismissed.

Save Our eccSystems, Inc., et al., 85 IBLA 300 (Mar. 15, 1985)

Under 43 CFR 4.410, a party to a case who is adversely affected by a BLM decision is properly recognized as having standing to appeal to the Board of Land Appeals.

Kenai Natives Ass'n, Inc., 87 IBLA 58 (May 28, 1985)

Where BLM denies a protest to a proposed private land exchange, it must inform the protestant of its right to appeal. The right of appeal is not dependent upon BLM's determination of whether the protestant claims ownership of public lands in the proposal or holds a valid existing contract, permit or lease for those lands. Denial of a protest makes the protestant a "party to a case" within the meaning of 43 CFR 4.410. Whether a party to a case has an interest which has been adversely affected by the BLM decision is a matter to be decided by the Board of Land Appeals on appeal.

Steinheimer Trust, 87 IBLA 308 (June 25, 1985)

Timely Filing

An appeal under the Contract Disputes Act filed more than 90 days after a contractor's receipt of a contracting officer's final decision is dismissed as untimely.

Appeal of William Cargile Contractor, Inc., IBCA-1787-3-84 (Jan. 8, 1985)
92 I.D. 53

Where a coal lessee is notified of the terms and conditions of the coal lease upon modification and is informed of the effective date assigned to the lease, such lessee must timely object or thereafter be barred from arguing the propriety of the modified lease's terms and conditions.

AMCA Coal Leasing, Inc., 86 IBLA 21 (Mar. 29, 1985)

Notice of appeal must be filed within 30 days after the person taking the appeal is served with the decision from which the appeal is taken. The timely filing of a notice of appeal is jurisdictional and failure to file the appeal within the time allowed requires dismissal of the appeal.

Oscar Mineral Group #3, 87 IBLA 48 (May 23, 1985)

RULES OF PRACTICE--Continued

EVIDENCE

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents filed with them is rebuttable by probative evidence to the contrary. However, an affidavit that evidence of assessment work was timely filed with the proper BLM office must ordinarily be corroborated by other evidence to establish filing where there is no evidence of receipt of the documents in the file.

John R. Wellborn, Clara Joe Wellborn, 87 IBLA 20 (May 21, 1985)

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents filed with them is rebuttable by probative evidence to the contrary. However, the presumption is not overcome by submission of a statement that a document was mailed. Rather, BLM's denial of receipt of a document can be rebutted only by probative evidence.

James Boatman, 87 IBLA 31 (May 22, 1985)

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents filed with them is rebuttable by probative evidence to the contrary. However, a statement that evidence of assessment work was timely filed with the proper BLM office must ordinarily be corroborated by other evidence to establish filing where there is no evidence of receipt of the document in the file.

Larry C. Hoffman, 87 IBLA 225 (June 19, 1985)

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally sufficient documents filed with them is rebuttable by probative evidence to the contrary. The presumption is not overcome by a statement, without corroborating evidence, that a document was mailed.

Howard Gates, 87 IBLA 261 (June 21, 1985)

The legal presumption of regularity that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents filed with them is rebuttable by probative evidence to the contrary. However, an uncorroborated statement that an affidavit of assessment work was timely filed with the proper BLM office is insufficient to overcome that presumption.

Ronald Edwards, 87 IBLA 367 (June 27, 1985)

Jack Bolke, Paul Pilch, 88 IBLA 58 (July 17, 1985)

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced documents filed with them is rebuttable by probative evidence to the contrary. The presumption is not overcome by a statement, without corroborating evidence, that a document was mailed.

Fern L. Evans, Gary L. Carter, 88 IBLA 45 (July 10, 1985)

RULES OF PRACTICE--Continued

EVIDENCE--Continued

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally sufficient documents filed with them is rebuttable by probative evidence to the contrary. The presumption is not overcome by an uncorroborated statement that a document was mailed.

George W. Wagner, Hazel T. Wagner, 88 IBLA 117 (July 31, 1985)

Where on appeal BLM challenges findings made by an Administrative Law Judge on grounds that his findings concerning credibility of witnesses are inadequate to justify the decision as announced, the Board of Land Appeals will examine the record to determine whether, on the basis of all evidence, the findings made by the fact-finder are supported by credible testimony.

Bureau of Land Management v. David & Bonnie Ericsson, 88 IBLA 248 (Sept. 4, 1985)

The legal presumption that administrative officials have properly discharged their official duties and not lost legally significant documents filed with them may be rebutted by sufficient probative evidence that a particular document was not only transmitted but received by the proper office. When it is asserted that a particular document is one of multiple documents filed with BLM, proving receipt of some of the multiple documents does not prove receipt of the unaccounted-for document.

Neal R. Foster et al., 88 IBLA 296 (Sept. 13, 1985)

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents filed with them is rebuttable by probative evidence to the contrary. However, an allegation that evidence of assessment work was timely filed with the proper BLM office must ordinarily be corroborated by other evidence to establish filing where there is no evidence of receipt of the documents in the file.

Ralph C. Memmott, 88 IBLA 372 (Sept. 27, 1985)

GOVERNMENT CONTESTS

Neither actual nor constructive notice of a Departmental decision is accomplished by an attempted service using certified mail where the delivering post office returns the decision to the Department after 7 days and it affirmatively appears that the addressee had not moved nor refused delivery, and the address used was his address of record.

While 43 U.S.C. § 1165 (1982) provides for issuance of a patent to an entryman upon a 2-year lapse following issuance of "receipt" when no contest is then pending, the statutory 2-year period does not begin to run at the time the entryman files his final proof, but begins only upon payment for the land. Where appellant had not paid for the land sought to be patented, but had only paid fees associated with filing his homestead entry, he was not entitled to patent.

Failure by the Government to deliver a notice of contest action brought against a homestead entry within 30 days of commencement of action does not affect the validity of the complaint where notice of the action is given to the entryman in a reasonably timely manner.

Terry L. Wilson, 85 IBLA 206 (Feb. 28, 1985)

RULES OF PRACTICE--Continued

GOVERNMENT CONTESTS--Continued

Where conflicting evidence exists concerning a Native allotment applicant's use and occupancy of the land claimed which raises material factual issues, the Bureau of Land Management should initiate a Government contest so that those issues can be resolved at a hearing.

Pedro Bay Corp., 88 IBLA 349 (Sept. 24, 1985)

HEARINGS

Where the proponent of a land exchange raises substantial questions concerning the accuracy of a BLM appraisal of the value of the selected land, including the use of appropriate comparable sales, the need to apply a discount to financed transactions and the extent of adjustments to assure comparability for the cost of bringing in utilities and modifying topography, the case will be referred to the Hearings Division for a fact-finding hearing.

Fallon Ice & Cold Storage Co., Willow Lane Corp., 85 IBLA 224 (Feb. 28, 1985)

Where a party challenging acceptance of a dependent resurvey presents sufficient evidence to raise a question of fact whether the dependant resurvey is an accurate reestablishment of a section line, the Board will order a fact-finding hearing pursuant to 43 CFR 4.415.

Stoddard Jacobsen, Robert C. Downer, 85 IBLA 335 (Mar. 22, 1985)

A hearing is not necessary in the absence of a material issue of fact, which, if proven, would alter the disposition of the matter. A hearing is not necessary where the dispute does not involve facts, but involves the proper application and interpretation of those facts, and the Bureau of Land Management properly reviewed the same information submitted to this Board.

Woods Petroleum Co., 86 IBLA 46 (Apr. 10, 1985)

PRIVATE CONTESTS

Jurisdiction over disputes between rival mining claimants is reserved to the courts, and it is not for this Department to decide whether one claimant has a better right to a claim because of a rival claimant's alleged failure to file the documents required under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976).

Sandra Memmott, 88 IBLA 379 (Sept. 27, 1985)

PROTESTS

A protest within the meaning of 43 CFR 4.450-2 is an objection "to any action proposed to be taken" in any proceeding before the Bureau of Land Management. A protest to the issuance of an oil and gas lease filed after the lease has issued by one not previously a party to the case is not timely, and dismissal of such a protest will be affirmed on appeal.

Sierra Club Legal Defense Fund, Inc., Natural Resources Defense Council, Inc., California Wilderness Coalition, 84 IBLA 311 (Jan. 7, 1985) 92 I.D. 37

RULES OF PRACTICE--Continued

PROTESTS--Continued

In adjudicating a protest against an application for radio communications right-of-way, the Bureau of Land Management is required by 43 CFR 4.450-2 only to consider and decide matters which are proposed to be done. Where an application for right-of-way has already matured into a functioning use, a protest against the proposal upon which the use was initiated must be dismissed.

Willamette Logging Communications, Inc., Springfield Radio Communications, Inc., 86 IBLA 77 (Apr. 10, 1985)

A decision denying a protest of the contemplated issuance of noncompetitive geothermal resources leases will not be effective during the period of time in which the protestant adversely affected by the decision may file a notice of appeal, and leases issued during this time are subject to cancellation.

Sierra Club, Oregon Chapter, 87 IBLA 1 (May 17, 1985)

Where BLM denies a protest to a proposed private land exchange, it must inform the protestant of its right to appeal. The right of appeal is not dependent upon BLM's determination of whether the protestant claims ownership of public lands in the proposal or holds a valid existing contract, permit or lease for those lands. Denial of a protest makes the protestant a "party to a case" within the meaning of 43 CFR 4.41C. Whether a party to a case has an interest which has been adversely affected by the BLM decision is a matter to be decided by the Board of Land Appeals on appeal.

Steinheimer Trust, 87 IBLA 308 (June 25, 1985)

SECRETARY OF THE INTERIOR

By informing the Board of Indian Appeals and the parties in writing that he is exercising his reserved authority under 43 CFR 4.5 to take jurisdiction over a case, the Secretary can avoid the potential problems that are likely to result from the simultaneous exercise of jurisdiction by two Departmental offices.

Interim Ad Hoc Committee of the Karuk Tribe v. Area Director, Sacramento Area Office, Bureau of Indian Affairs, 13 IBIA 76 (Jan. 8, 1985) 92 I.D. 46

BLM has the authority to decide whether to issue a noncompetitive geothermal resources lease pursuant to sec. 3 of the Geothermal Steam Act of 1970, 30 U.S.C. § 1002 (1982), for land within a national forest where the Forest Service has consented to leasing, and to impose additional stipulations, in order to protect environmental resources, not inconsistent with those prescribed by the Forest Service. Where BLM has expressly not exercised that authority, the case will be remanded for that purpose, including a consideration of whether BLM has properly provided for staged leasing, i.e., leasing subject to subsequent approval of specific development activities contingent on a finding that no environmentally unacceptable impact will occur.

Sierra Club, Oregon Chapter, 87 IBLA 1 (May 17, 1985)

SECRETARY OF THE INTERIOR--Continued

Mining claims located on land closed to entry and location under the mining laws by a withdrawal order of the Secretary of the Interior pursuant to the Alaska Native Claims Settlement Act are null and void ab initio; however, where such a withdrawal order does not specifically close the land to mineral location, but only to mineral leasing, and there is no indication that mineral location was to be foreclosed, the withdrawal order will not be held to preclude mineral location.

Whelan's Mining & Exploration, Inc., 88 IBLA 336 (Sept. 19, 1985)

SEGREGATION

Where the public records indicate that land is segregated from appropriation by the filing of a state selection application, a mining claim located on such land is properly declared null and void ab initio.

William Mrak et al., 86 IBLA 16 (Mar. 29, 1985)

Where a lode mining claim is located partially on withdrawn or patented land, it is not null and void ab initio to the extent of its inclusion of such lands. A locator whose discovery is on lands open to location may extend the end lines and side lines of his claim across withdrawn or patented land to define the extralateral rights to lodes or veins which apex within the claim.

Timberline Mining Co., 87 IBLA 264 (June 24, 1985)

Under 43 CFR 2091.6-4 and 2627.4(b), the filing of a state's application to select lands, where the filing is regular on its face, segregates the lands from all subsequent appropriation, including location and entry under the mining laws. Where a selection application filed by the State of Alaska pursuant to sec. 6(b) of the Alaska Statehood Act, 72 Stat. 339, seeks to include national forest lands, the application is not regular on its face because national forest lands cannot be selected under authority of sec. 6(b) of the Act.

Under the so-called "notation" or "tract book" rule, after a state selection application is filed and noted on official land office records, the mere notation or recording of the application has the effect of segregating the land from all subsequent appropriations, including locations under the mining laws, regardless of whether the selection application was void or voidable.

It was not error for the Bureau of Land Management to invoke the "notation rule" on the basis of state selection applications noted on its master title plats, regardless of what other records may have conveyed regarding the validity of the applications. The ordinary citizen contemplating a proposed use of the public lands would quite reasonably look to other than lands embraced in Tps. 10 and 11 N., Rs. 2 E., Seward Meridian, upon discerning from the master title plats for these townships that they were included in State selection applications. Further, there is nothing on the face of the master title plats that would suggest the State selection entries were invalid.

Although the Board has on one occasion undertaken an *in pari materia* consideration of various land status records (*i.e.*, the master title plat, historical index, and serial register sheets for a state selection application) as a further method of determining whether public lands were appropriated at a particular time, this was only done because of a conflict noted between the plat and the index. Here, an *in pari materia* consideration of the historical indices and the serial

SEGREGATION--Continued

register sheets in conjunction with the master title plats fails to establish that Chugach National Forest lands (on which appellant's mining claims were located) were excluded from any of the four State selection applications at issue or that such selection applications were rejected in part to the extent national forest lands were included in the applications.

E. J. Tcohey, C. D. Tcohey, & C. W. Tcohey, 88 IBLA 66 (July 23, 1985) 92 I.D. 317

SODIUM LEASES AND PERMITS

LEASES

A sodium prospecting permittee who applies for a sodium preference right lease, alleging with supportive data that he has discovered a valuable deposit of sodium and that the land is chiefly valuable for sodium, as required by sec. 24 of the Mineral Leasing Act of 1920, *as amended*, 30 U.S.C. § 262 (1982), is entitled to a hearing before an Administrative Law Judge, pursuant to the provisions of 43 CFR 3521.1-1(j)(2), before his lease application may be finally rejected.

Yankee Gulch Joint Venture et al., 84 IBLA 353 (Jan. 22, 1985)

PERMITS

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Yankee Gulch Joint Venture et al., 84 IBLA 353 (Jan. 22, 1985)

SPECIAL USE PERMITS

Where an application for a special use permit is filed after a deadline imposed by the Bureau of Land Management for compelling administrative reasons, the application is properly rejected.

Ken Warren Outdoors, Inc., 85 IBLA 354 (Mar. 25, 1985)

A BLM determination to issue special recreation use permits for two off-road vehicle events on Cow Mountain is discretionary, and BLM may properly approve permit applications for such organized events where the proposed use is consistent with the objectives, responsibilities, or programs for the management of the public lands involved.

Mendocino County Tax-Payers Land Use Committee, 86 IBLA 319 (May 16, 1985)

STATE LANDS

Lands conveyed to a state as a result of an in-lieu selection are not available for the location of mining claims under the Federal law. Mining claims located on such lands pursuant to the 1872 Mining Law, 30 U.S.C. §§ 21 through 54 (1982), are null and void ab initio.

Ralph C. Mennott, 88 IBLA 360 (Sept. 27, 1985)

STATE SELECTIONS

Where state selection applications were rejected by decisions approving conflicting Native allotment applications, the State of Alaska has standing to appeal those decisions to the Board of Land Appeals.

State of Alaska, 85 IBLA 196 (Feb. 27, 1985)

Where the public records indicate that land is segregated from appropriation by the filing of a state selection application, a mining claim located on such land is properly declared null and void ab initio.

William Mrak et al., 86 IBLA 16 (Mar. 29, 1985)

Under 43 CFR 2091.6-4 and 2627.4(b), the filing of a state's application to select lands, where the filing is regular on its face, segregates the lands from all subsequent appropriation, including location and entry under the mining laws. Where a selection application filed by the State of Alaska pursuant to sec. 6(b) of the Alaska Statehood Act, 72 Stat. 339, seeks to include national forest lands, the application is not regular on its face because national forest lands cannot be selected under authority of sec. 6(b) of the Act.

Under the so-called "notation" or "tract book" rule, after a state selection application is filed and noted on official land office records, the mere notation or recording of the application has the effect of segregating the land from all subsequent appropriations, including locations under the mining laws, regardless of whether the selection application was void or voidable.

It was not error for the Bureau of Land Management to invoke the "notation rule" on the basis of state selection applications noted on its master title plats, regardless of what other records may have conveyed regarding the validity of the applications. The ordinary citizen contemplating a proposed use of the public lands would quite reasonably look to other than lands embraced in Tps. 10 and 11 N., Rs. 2 E., Seward Meridian, upon discerning from the master title plats for these townships that they were included in State selection applications. Further, there is nothing on the face of the master title plats that would suggest the State selection entries were invalid.

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STATE SELECTIONS--Continued

applications at issue or that such selection applications were rejected in part to the extent national forest lands were included in the applications.

R. J. Tochey, C. D. Tochey, & C. W. Tochey, 88 IBLA 66 (July 23, 1985) 92 I.D. 317

Lands conveyed to a state as a result of an in-lieu selection are not available for the location of mining claims under the Federal law. Mining claims located on such lands pursuant to the 1872 Mining Law, 30 U.S.C. §§ 21 through 54 (1982), are null and void ab initio.

Ralph C. Mennott, 88 IBLA 360 (Sept. 27, 1985)

STATUTES

An essential element of a claim for estoppel is that the party asserting it must be ignorant of the true facts. Since, however, all persons are presumed to have knowledge of relevant statutory and regulatory provisions, an individual may not premise a claim of estoppel on information or advice contrary to such a provision.

Marion E. Banks, Noble Craver, & August Carniglia, 88 IBLA 341 (Sept. 19, 1985)

STATUTORY CONSTRUCTION

GENERALLY

The language of sec. 601(f) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1781(f) (1982), was intended by Congress to have application to patents issued to mining claims which had been perfected after passage of the Act. A patent to a mining claim which had been perfected prior to passage of the Act should, therefore, not contain the restrictive language contemplated by sec. 601(f).

Lee Chemicals, 86 IBLA 164 (Apr. 25, 1985)

LEGISLATIVE HISTORY

The legislative history of the Act of July 6, 1960, clearly shows that Congress concluded that the Federal Government holds title to land relinquished to the Federal Government in anticipation of a forest lieu exchange, notwithstanding the failure to consummate the exchange.

Frederick Siemon, 86 IBLA 149 (Apr. 25, 1985)

The language of sec. 601(f) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1781(f) (1982), was intended by Congress to have application to patents issued to mining claims which had been perfected after passage of the Act. A patent to a mining claim which had been perfected prior to passage of the Act should, therefore, not contain the restrictive language contemplated by sec. 601(f).

Lee Chemicals, 86 IBLA 164 (Apr. 25, 1985)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

GENERALLY

Sec. 528(a) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1278(2) (1982) states that the provisions of the Act shall not apply to mining operations which affect 2 acres or less. "Affected area" as defined by 30 CFR 701.5 includes "the area located above underground workings." Where 1.38 acres of surface area above appellant's underground workings is added to the 0.79 acres of above ground disturbance, the total affected area is 2.17 acres and appellant's mining operation is within the jurisdiction of the Act.

S & S Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 87 IBLA 350 (June 27, 1985)

ADMINISTRATIVE PROCEDURE

Generally

The Office of Surface Mining Reclamation and Enforcement may not vacate a notice of violation while an application for review of the notice of violation is pending before an Administrative Law Judge. When an application for review is timely filed, jurisdiction over the subject matter is lodged in the reviewing official or tribunal, and only that official or tribunal has the authority to vacate the notice of violation.

Gateway Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 84 IBLA 371 (Jan. 25, 1985)

Burden of Proof

In an application for review proceeding, a person contesting the jurisdiction of the Office of Surface Mining must plead and prove the basis for its claim as an affirmative defense.

Race Fork Coal Corp. v. Office of Surface Mining Reclamation & Enforcement, 84 IBLA 383 (Jan. 28, 1985)
92 I.D. 68

APPEALS

Generally

Under 43 CFR 4.1271(a), a party may not file a "notice of appeal" with the Board of Land Appeals from an order or decision of an Administrative Law Judge disposing of a civil penalty proceeding. Instead, any party seeking review of an order or decision in a civil penalty proceeding may file a petition for discretionary review with the Board under 43 CFR 4.1158 and 4.1270.

Tri Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 85 IBLA 146 (Feb. 21, 1985)

APPLICABILITY

Generally

In an application for review proceeding, a person contesting the jurisdiction of the Office of Surface Mining must plead and prove the basis for its claim as an affirmative defense.

Race Fork Coal Corp. v. Office of Surface Mining Reclamation & Enforcement, 84 IBLA 383 (Jan. 28, 1985)
92 I.D. 68

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

APPLICABILITY--Continued

Generally--Continued

One claiming an exemption from regulation under the Surface Mining Control and Reclamation Act of 1977 bears the burden of affirmatively demonstrating entitlement to the exemption.

S & S Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 87 IBLA 350 (June 27, 1985)

ATTORNEYS' FEES/COSTS AND EXPENSES

Standards for Award

Appellants' failure to obtain any part of the benefit sought by their claims for relief prevents payment of their claim for reimbursement of costs, expenses, and attorney's fees pursuant to provision of 43 CFR 4.1290 and 4.1294.

Appellants' failure to make a substantial contribution to the resolution of pending claims for relief and to achieve some degree of success in prosecuting their claims before the Department bars award of attorney's fees under Departmental regulations and applicable law.

Donald St. Clair et al., 84 IBLA 236 (Jan. 2, 1985)
92 I.D. 1

In computing an award for attorney's fees under the Surface Mining Control and Reclamation Act of 1977 and Departmental regulations, the Board is guided by the standards set forth by the United States Court of Appeals for the District of Columbia Circuit in Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980). Under Copeland, the Board must first establish the "lodestar," i.e., the number of hours expended times a reasonable hourly rate. In order to establish market value for services of attorneys who do not have hourly rates set by the marketplace, it is necessary to look to rates charged by comparable attorneys litigating similar matters who have such rates.

The burden of proving that upward adjustment of an award for attorneys' fees is appropriate is on the applicant for the award. No upward adjustments are warranted for factors such as risk of success where the case is not exceptional, and delay in payment where delay is not inordinate.

Virginia Citizens for Better Reclamation, Virginia D. Hill, 88 IBLA 126 (Aug. 2, 1985)

CESSATION ORDERS

Generally

An authorized representative of the Secretary properly issues a cessation order under 30 CFR 843.11(a)(2) where an operator is conducting surface coal mining and reclamation operations without a valid surface coal mining permit.

S & S Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 87 IBLA 350 (June 27, 1985)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

CITIZEN COMPLAINTS

Generally

"Surface coal mining operations." A crushing and loading facility operated in connection with a coal mine need not be located at or near such mine in order to be a surface coal mining operation within the meaning of sec. 701(28)(A) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1291(28)(A) (1982).

Tommy Carpenter et al., 88 IBLA 286 (Sept. 10, 1985) 92 I.D. 383

CIVIL PENALTIES

Generally

Under 43 CFR 4.1271(a), a party may not file a "notice of appeal" with the Board of Land Appeals from an order or decision of an Administrative Law Judge disposing of a civil penalty proceeding. Instead, any party seeking review of an order or decision in a civil penalty proceeding may file a petition for discretionary review with the Board under 43 CFR 4.1158 and 4.1270.

Under sec. 518(c) of Surface Mining Control and Reclamation Act and 43 CFR 4.1152(b), a petition for review of a proposed civil penalty must be accompanied by full payment of the proposed assessment. Timely prepayment of the amount of a proposed civil penalty by one seeking review of the penalty is essential to establish the jurisdiction of the Hearings Division and the Board of Land Appeals. Where prepayment is not made until after the deadline for filing the petition for review, the petitioner has failed to make timely prepayment, and the petition must be denied.

Tri Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 85 IBLA 146 (Feb. 21, 1985)

Prepayment

Under sec. 518(c) of Surface Mining Control and Reclamation Act and 43 CFR 4.1152(b), a petition for review of a proposed civil penalty must be accompanied by full payment of the proposed assessment. Timely prepayment of the amount of a proposed civil penalty by one seeking review of the penalty is essential to establish the jurisdiction of the Hearings Division and the Board of Land Appeals. Where prepayment is not made until after the deadline for filing the petition for review, the petitioner has failed to make timely prepayment, and the petition must be denied.

Tri Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 85 IBLA 146 (Feb. 21, 1985)

DISCRIMINATION

Generally

A state agency is not a "person" for purposes of an employee protection proceeding initiated by an aggrieved employee pursuant to sec. 703 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1293 (1982), and the Department has no jurisdiction to adjudicate an application for review of alleged discriminatory acts by that agency.

James E. Leber v. George Sterling et al., 88 IBLA 224 (Aug. 29, 1985) 92 I.D. 363

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

EMPLOYEE PROTECTION

Generally

A state agency is not a "person" for purposes of an employee protection proceeding initiated by an aggrieved employee pursuant to sec. 703 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1293 (1982), and the Department has no jurisdiction to adjudicate an application for review of alleged discriminatory acts by that agency.

James E. Leber v. George Sterling et al., 88 IBLA 224 (Aug. 29, 1985) 92 I.D. 363

ENFORCEMENT PROCEDURES

Generally

Where a state has acquired primacy over the regulation of surface mining operations within the state, the Office of Surface Mining Reclamation and Enforcement is required to conduct an immediate Federal inspection on the basis of a citizen's complaint under 30 CFR 842.11(b)(1) only if the person requesting the inspection provides adequate proof that an imminent danger exists and that the state regulatory authority has failed to take appropriate action.

Where a person requesting a Federal inspection pursuant to 30 CFR 842.11(b)(1) is required to furnish adequate proof that an imminent danger exists, he does not have an obligation to provide proof that an operation affects more than 2 acres, because the burden of proving an exemption from the Act rests upon the party asserting the exemption.

A State regulatory authority has failed to take appropriate action against a surface coal mining operator creating an imminent danger when it has been enjoined by a State court from taking enforcement action determined necessary to secure abatement of the violation.

Departmental regulation 30 CFR 842.11(b)(1) does not authorize OSM to postpone an inspection required by that provision until it conducts a reclamation fee compliance audit of the alleged violators.

Thomas J. Fitzgerald, 88 IBLA 24 (July 5, 1985)

HEARINGS

Generally

Under 43 CFR 4.1271(a), a party may not file a "notice of appeal" with the Board of Land Appeals from an order or decision of an Administrative Law Judge disposing of a civil penalty proceeding. Instead, any party seeking review of an order or decision in a civil penalty proceeding may file a petition for discretionary review with the Board under 43 CFR 4.1158 and 4.1270.

Under sec. 518(c) of Surface Mining Control and Reclamation Act and 43 CFR 4.1152(b), a petition for review of a proposed civil penalty must be accompanied by full payment of the proposed assessment. Timely prepayment of the amount of a proposed civil penalty by one seeking review of the penalty is essential to establish the jurisdiction of the Hearings Division and the Board of Land Appeals. Where prepayment is not made until after the deadline for filing the petition for review, the petitioner has failed to make timely prepayment, and the petition must be denied.

Tri Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 85 IBLA 146 (Feb. 21, 1985)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977 --Continued

INSPECTIONS

Generally

Warrantless inspections under the Surface Mining Control and Reclamation Act of 1977 are constitutionally permissible.

S & S Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 87 IBLA 350 (June 27, 1985)

Where a state has acquired primacy over the regulation of surface mining operations within the state, the Office of Surface Mining Reclamation and Enforcement is required to conduct an immediate Federal inspection on the basis of a citizen's complaint under 30 CFR 842.11(b)(1) only if the person requesting the inspection provides adequate proof that an imminent danger exists and that the state regulatory authority has failed to take appropriate action.

Where a person requesting a Federal inspection pursuant to 30 CFR 842.11(b)(1) is required to furnish adequate proof that an imminent danger exists, he does not have an obligation to provide proof that an operation affects more than 2 acres, because the burden of proving an exemption from the Act rests upon the party asserting the exemption.

A State regulatory authority has failed to take appropriate action against a surface coal mining operator creating an imminent danger when it has been enjoined by a State court from taking enforcement action determined necessary to secure abatement of the violation.

Departmental regulation 30 CFR 842.11(b)(1) does not authorize OSM to postpone an inspection required by that provision until it conducts a reclamation fee compliance audit of the alleged violators.

Thomas J. Fitzgerald, 88 IBLA 24 (July 5, 1985)

NOTICES OF VIOLATION

Generally

The Office of Surface Mining Reclamation and Enforcement may not vacate a notice of violation while an application for review of the notice of violation is pending before an Administrative Law Judge. When an application for review is timely filed, jurisdiction over the subject matter is lodged in the reviewing official or tribunal, and only that official or tribunal has the authority to vacate the notice of violation.

Gateway Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 84 IBLA 371 (Jan. 25, 1985)

PERMITS

Generally

An authorized representative of the Secretary properly issues a cessation order under 30 CFR 843.11(a)(2) where an operator is conducting surface coal mining and reclamation operations without a valid surface coal mining permit.

S & S Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 87 IBLA 350 (June 27, 1985)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977 --Continued

PUBLIC HEALTH AND SAFETY

Imminent Danger

Where a state has acquired primacy over the regulation of surface mining operations within the state, the Office of Surface Mining Reclamation and Enforcement is required to conduct an immediate Federal inspection on the basis of a citizen's complaint under 30 CFR 842.11(b)(1) only if the person requesting the inspection provides adequate proof that an imminent danger exists and that the state regulatory authority has failed to take appropriate action.

Where a person requesting a Federal inspection pursuant to 30 CFR 842.11(b)(1) is required to furnish adequate proof that an imminent danger exists, he does not have an obligation to provide proof that an operation affects more than 2 acres, because the burden of proving an exemption from the Act rests upon the party asserting the exemption.

A State regulatory authority has failed to take appropriate action against a surface coal mining operator creating an imminent danger when it has been enjoined by a State court from taking enforcement action determined necessary to secure abatement of the violation.

Departmental regulation 30 CFR 842.11(b)(1) does not authorize OSM to postpone an inspection required by that provision until it conducts a reclamation fee compliance audit of the alleged violators.

Thomas J. Fitzgerald, 88 IBLA 24 (July 5, 1985)

ROADS

Generally

A road used for hauling coal or as access to a mine must be included in a permit unless an operator shows that: (1) the road has been duly established as a public road according to the laws of the jurisdiction in which it is located; (2) there is substantial (more than incidental) public use of the road; and (3) the road is actually maintained with public funds in a manner similar to other public roads in the vicinity. The decision of the Administrative Law Judge vacating notices of violation issued to an operator for utilizing roads not properly permitted will be affirmed where the record contains evidence to support his conclusions that the roads are public roads within the meaning of the regulation.

Harman Mining Corp. v. Office of Surface Mining Reclamation & Enforcement, 87 IBLA 369 (June 28, 1985)

TEMPORARY RELIEF

Evidence

A party seeking temporary relief from enforcement action by the Office of Surface Mining Reclamation and Enforcement must show a substantial likelihood that the findings of the Secretary in the matter to which the application relates will be favorable to the applicant.

S & S Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 87 IBLA 350 (June 27, 1985)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977 --Continued

TEMPORARY RELIEF--Continued

Significant, Imminent Environmental Harm

Where a state has acquired primacy over the regulation of surface mining operations within the state, the Office of Surface Mining Reclamation and Enforcement is required to conduct an immediate Federal inspection on the basis of a citizen's complaint under 30 CFR 842.11(b)(1) only if the person requesting the inspection provides adequate proof that an imminent danger exists and that the state regulatory authority has failed to take appropriate action.

Where a person requesting a Federal inspection pursuant to 30 CFR 842.11(b)(1) is required to furnish adequate proof that an imminent danger exists, he does not have an obligation to provide proof that an operation affects more than 2 acres, because the burden of proving an exemption from the Act rests upon the party asserting the exemption.

A State regulatory authority has failed to take appropriate action against a surface coal mining operator creating an imminent danger when it has been enjoined by a State court from taking enforcement action determined necessary to secure abatement of the violation.

Departmental regulation 30 CFR 842.11(b)(1) does not authorize OSM to postpone an inspection required by that provision until it conducts a reclamation fee compliance audit of the alleged violators.

Thomas J. Fitzgerald, 88 IBLA 24 (July 5, 1985)

TIPPLES AND PROCESSING PLANTS

At or Near a Minesite

"Surface coal mining operations." A crushing and loading facility operated in connection with a coal mine need not be located at or near such mine in order to be a surface coal mining operation within the meaning of sec. 701(28)(A) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1291(28)(A) (1982).

Tommy Carpenter et al., 88 IBLA 286 (Sept. 10, 1985)
92 I.D. 383

In Connection With

Offsite processing facilities are operated "in connection with" surface mines where the owner and operator of the facility is also the permittee and/or operator of a group of supplying mines.

Race Fork Coal Corp. v. Office of Surface Mining Reclamation & Enforcement, 84 IBLA 383 (Jan. 28, 1985)
92 I.D. 68

"Surface coal mining operations." A crushing and loading facility operated in connection with a coal mine need not be located at or near such mine in order to be a surface coal mining operation within the meaning of sec. 701(28)(A) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1291(28)(A) (1982).

Tommy Carpenter et al., 88 IBLA 286 (Sept. 10, 1985)
92 I.D. 383

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977 --Continued

VARIANCES AND EXEMPTIONS

Generally

One claiming an exemption from regulation under the Surface Mining Control and Reclamation Act of 1977 bears the burden of affirmatively demonstrating entitlement to the exemption.

S & S Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 87 IBLA 350 (June 27, 1985)

2-Acre

Sec. 528(a) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1278(2) (1982) states that the provisions of the Act shall not apply to mining operations which affect 2 acres or less. "Affected area" as defined by 30 CFR 701.5 includes "the area located above underground workings." Where 1.38 acres of surface area above appellant's underground workings is added to the 0.79 acres of above ground disturbance, the total affected area is 2.17 acres and appellant's mining operation is within the jurisdiction of the Act.

S & S Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 87 IBLA 350 (June 27, 1985)

WORDS AND PHRASES

"Surface coal mining operations." A crushing and loading facility operated in connection with a coal mine need not be located at or near such mine in order to be a surface coal mining operation within the meaning of sec. 701(28)(A) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1291(28)(A) (1982).

Tommy Carpenter et al., 88 IBLA 286 (Sept. 10, 1985)
92 I.D. 383

SURVEYS OF PUBLIC LANDS

GENERALLY

"Protraction survey" or "protraction diagram." A "protraction survey" or "protraction diagram," which consists of lines drawn on a map that follow the public land survey system, but which is not based upon a field survey with monumentation, is not an official survey and therefore the requirement that a placer mineral patent application be accompanied by a mineral survey of the unsurveyed land is not waived when the unsurveyed land is covered by a protraction survey.

Dennis J. Kitts, 84 IBLA 338 (Jan. 15, 1985)

Where lands in a grant or patent from the United States are described in terms of the rectangular surveying system, the right, title, or interest acquired thereby is that defined by the corners of the original Government survey upon which the description is based.

A survey of public lands creates and does not merely identify the boundaries of sections of land. A patentee of public land takes according to the actual survey on the ground, even though the official survey plat may not show the tract as it is located on the ground, or the patent description may be in error as to the quantity of land stated.

Where a plat of resurvey indicates that more land is included within the boundaries of a patented tract than was shown by the plat of original survey in

SURVEYS OF PUBLIC LANDS--Continued

GENERALLY--Continued

accordance with which the patent was issued, the boundaries of the patented tract as established by the original survey, and not the acreage indicated on the plat of the original survey, determine the quantity of land which was conveyed by the patent.

Robert R. Perry, 87 IBLA 380 (June 28, 1985)

DEPENDENT RESURVEYS

Where a party challenging acceptance of a dependent resurvey presents sufficient evidence to raise a question of fact whether the dependant resurvey is an accurate reestablishment of a section line, the Board will order a fact-finding hearing pursuant to 43 CFR 4.415.

Stoddard Jacobsen, Robert C. Downer, 85 IBLA 335 (Mar. 22, 1985)

TIMBER SALES AND DISPOSALS

In the absence of a timely written request for an extension of a timber sale contract, pursuant to the terms thereof, BLM may properly treat the right of the holder of the contract to cut and remove timber as having expired at the end of the contract's extended term.

David G. Aden, 84 IBLA 303 (Jan. 3, 1985)

A party seeking to establish that BLM has violated applicable policies regarding clearcutting on Federal leases has the burden of showing error in BLM's actions. A mere disagreement or difference of opinion will not establish such error.

Sec. 1 of the Act of Aug. 28, 1937, 43 U.S.C. § 1181a-1181f (1982), requires that revested Oregon and California Railroad lands classified as timberlands shall be managed (with one exception) for permanent forest production and that the timber thereon shall be sold, cut, and removed in conformity with the principle of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facilities.

Authority for BLM's clearcut harvest of low-intensity lands, whose timber forms no part of allowable cut, is found in sec. 307(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1737(a) (1982), wherein the Secretary is authorized to conduct investigations, studies, and experiments on his own initiative or in cooperation with others involving the management, protection, development, acquisition, and conveying of public lands.

In re Upper Floras Timber Sale et al., 86 IBLA 296 (May 13, 1985)

A decision to implement a timber sale proposal based on a finding of no significant impact may be remanded where the environmental assessment for the sale, which supplements and is tiered to the programmatic environmental impact statement for the 10-year timber management program in the district, fails to adequately consider the site-specific impacts of the sale including any aspects of the timber sale which

TIMBER SALES AND DISPOSALS--Continued

vary significantly from the parameters considered in the programmatic environmental impact statement.

In re Hungry Mountain Timber Sale, 88 IBLA 7 (June 28, 1985)

TITLE

With respect to disputes between rival mining claimants concerning which claimant has the superior right to possession of a claim, a court of competent jurisdiction is the proper forum.

Wells J. Horvereid, 88 IBLA 345 (Sept. 24, 1985)

TRESPASS

GENERALLY

In order to prove livestock trespass upon public lands alleged to have occurred when excessive numbers of cattle were grazed upon allotments of public land permitted for lesser numbers, some actual trespass must be shown to have taken place before the "access trespass presumption" can be applied to calculate damages.

Bureau of Land Management v. David & Bonnie Ericsson, 88 IBLA 248 (Sept. 4, 1985)

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES ACT OF 1970

UNIFORM REAL PROPERTY ACQUISITION POLICY

Expenses Incidental to Transfer of Title to the United States

Additional real estate taxes incurred by the grantor of the acquired lands as a result of transfer of the lands to the United States, because for more than three years the lands, while owned by the grantor, enjoyed a lower tax assessment on the basis of farm or agricultural use, do not qualify for reimbursement as expenses incidental to conveying the real property to the United States under sec. 303 of the Act and implementing regulations of the Department.

Uniform Relocation Assistance Appeal of George C. Vournas, 6 OHA 23 (Mar. 25, 1985)

UNIFORM RELOCATION ASSISTANCE

Generally

Where the claim for a fixed schedule payment of a moving expense allowance and a dislocation allowance, in lieu of actual reasonable moving and related expenses, was filed after the time limitation prescribed by Departmental regulations implementing the Act, and the evidence of record does not justify an extension of the time for filing of the claim, the denial of the claim will be affirmed.

Uniform Relocation Assistance Appeal of George W. Schaeffer, Jr., 6 OHA 1 (Jan. 31, 1985)

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES ACT OF 1970--Continued

UNIFORM RELOCATION ASSISTANCE--Continued

Generally--Continued

The late filing of a benefits claim will be deemed to have been waived where, at the request of the claimant, the denial of the claim for late filing is reconsidered and the claim is disallowed on another basis.

A person who moved personal property from lands acquired by the United States prior to the acquisition of such lands by the United States and without being instructed to do so by the acquiring agency, is not a displaced person eligible for reimbursement of moving and related costs with respect to such property under the Act and the Department's regulations.

Uniform Relocation Assistance Appeal of Highway Pavers, Inc., 6 OHA 38 (June 18, 1985)

Moving and Related Expenses

Generally

A determination disallowing a claim for a benefits payment for tangible personal property losses will be affirmed where the claimant has not shown its entitlement to such benefits.

Uniform Relocation Assistance Appeal of Highway Pavers, Inc., 6 OHA 38 (June 18, 1985)

WILDERNESS ACT

Where the record evidences BLM's firsthand knowledge of the lands within an inventory unit and contains comments from the public as to the area's fitness for wilderness preservation, BLM's subjective judgments of the unit's naturalness qualities and whether an inventory unit possesses outstanding opportunities for solitude or a primitive and unconfined type of recreation are entitled to considerable deference.

In assessing the presence or absence of wilderness characteristics in an inventory unit, BLM necessarily makes subjective judgments which are entitled to considerable deference when challenged on appeal and such judgments may not be overcome simply by expressions of disagreement.

A BLM decision to eliminate an inventory unit from further consideration as a wilderness study area, pursuant to sec. 603(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1782(a) (1982), will be set aside and the case remanded to BLM where, on appeal, the appellant raises substantial questions concerning the adequacy of BLM's consideration of whether the unit has the requisite naturalness or outstanding opportunities for solitude or a primitive and unconfined type of recreation, and the record does not adequately support BLM's conclusions on these matters.

Committee for Idaho's High Desert, 85 IBLA 54 (Feb. 11, 1985)

Evaluations made by BLM personnel in the wilderness inventory process are necessarily subjective and judgmental. The conclusions reached must be accorded considerable deference notwithstanding the result might be one over which reasonable men could differ. An appellant seeking reversal must ordinarily show either a clear error of law or a demonstrable error of fact.

Committee for Idaho's High Desert, The Wilderness Society, 85 IBLA 112 (Feb. 14, 1985)

WILDERNESS ACT--Continued

In assessing the presence or absence of wilderness characteristics in an inventory unit, BLM necessarily makes subjective judgments which are entitled to considerable deference when challenged on appeal and such judgments may not be overcome simply by expressions of disagreements.

A BLM decision based on reassessment of the wilderness characteristics of a unit will be reversed where it is established that BLM failed properly to reassess the unit, and it is also established that such failure caused BLM to reach an incorrect conclusion.

Utah Wilderness Ass'n et al., Clive Kincaid, 86 IBLA 89 (Apr. 12, 1985)

WILDLIFE REFUGES AND PROJECTS

LEASES AND PERMITS

Generally, unless the mineral leasing laws or a withdrawal or reservation order specifically provides otherwise, lands withdrawn or reserved for a specific purpose are available for leasing, if issuance of a mineral lease would not be inconsistent with or interfere with the purpose for which the lands are withdrawn or reserved.

Pursuant to sec. 137 of the 1984 Continuing Resolution, 97 Stat. 981, and Instruction Memorandum No. 84-171, lease offers filed prior to Nov. 14, 1983, for any land within a unit of the National Wildlife Refuge System, outside of Alaska, must be kept in suspense, until such time, if ever, that changes to the applicable regulations are promulgated and an environmental impact statement is prepared.

TXO Production Corp., 87 IBLA 85 (May 29, 1985)

WITHDRAWALS AND RESERVATIONS

GENERALLY

An application to purchase a headquarters site is properly rejected where the applied-for land is not unreserved public land because the land has been segregated from all forms of appropriation under the public land laws under a prior recreation and public purpose classification pursuant to the Act of June 14, 1926, as amended, 43 U.S.C. § 869 (1982).

Mary S. Brandt, 85 IBLA 140 (Feb. 20, 1985))

To establish that a location of a mining claim made after a withdrawal is actually an amendment of a prior location made before the withdrawal, a claimant must show the earlier location included the portion of the claim subject to the withdrawal, that the person making the amended location had an unbroken chain of title with the original locators, and that the location predating the withdrawal was properly made.

Russell Hoffman (On Reconsideration), 87 IBLA 146 (June 11, 1985)

Under regulations in effect before 1976, a withdrawal application segregated all lands affected thereby upon the recording of the application on the master title plat and such segregation remained effective until the application was adjudicated and a notice of determination published in the Federal Register. Withdrawal applications filed after enactment of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1784 (1982), are governed by distinct statutory and regulatory provisions. Thus,

WITHDRAWALS AND RESERVATIONS--Continued

GENERALLY--Continued

under sec. 204 of the Act (43 U.S.C. § 1714) Congress has required that the segregative effect of a withdrawal application terminates upon the expiration of 2 years from the date of the Federal Register notice regarding the filing of the withdrawal application. In view of this clear statutory mandate, it was error for the Bureau of Land Management to extend application of the "notation rule" to Forest Service withdrawal application AA-23139, filed after enactment of the Federal Land Policy and Management Act of 1976, as grounds for rejecting appellants' mining claim locations.

B. J. Toohey, C. D. Toohey, & C. W. Toohey, 88 IBLA 66 (July 23, 1985) 92 I.D. 317

EFFECT OF

Where a lode mining claim is located partially on patented or withdrawn land, such a claim is not null and void ab initio to the extent of its inclusion of such lands. While the claim may not afford the claimant any rights whatever in the lands into which the claim is partially projected, the configuration of such a claim might, in the proper circumstances, invest the claimant with extralateral rights in other land beyond or adjacent to that land which is closed to mineral entry.

Silver Buckle Mines, Inc., 84 IBLA 306 (Jan. 7, 1985)

BLM properly determined that unpatented mining claims were null and void ab initio when they were located at a time when the land was withdrawn from mineral entry by Executive order for a military reservation and the withdrawal has not been revoked, even if the land is no longer being used for military purposes.

Guadalupe Resources Corp., 84 IBLA 344 (Jan. 16, 1985)

A mining claim located on land withdrawn from mineral entry at the time of location is properly declared null and void ab initio. The "date of location" of a mining claim is determined by reference to the laws of the state in which the claim is located.

John F. Malone et al., 86 IBLA 85 (Apr. 11, 1985)

Mining claims located on land previously withdrawn from mineral entry by Exec. Order No. 5327 and Public Land Order No. 4522 are properly declared null and void ab initio.

Azome Utah Mining Co., 86 IBLA 170 (Apr. 25, 1985)

Sec. 14(h)(1) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613(h)(1) (1982), authorizes the Secretary of the Interior to withdraw and convey existing historical places and cemetery sites to the appropriate regional corporation. A historical site application is properly rejected where the subject land was withdrawn by Public Land Order No. 5180, pursuant to 43 U.S.C. § 1616(d)(1) (1982), or withdrawn by Public Land Order No. 5250, pursuant to 43 U.S.C. § 1616(d)(2) (1982).

Bering Straits Native Corp., 87 IBLA 96 (May 30, 1985)

WITHDRAWALS AND RESERVATIONS--Continued

EFFECT OF--Continued

A mining claim is properly declared null and void if, at the time of location, the land is withdrawn from appropriation under the mining laws. Once land has been withdrawn from mineral entry, it remains withdrawn until the withdrawal is formally revoked. It is immaterial whether the lands are or will be used for the purpose for which they are withdrawn.

Raymond D. Dilley, 87 IBLA 150 (June 11, 1985)

BLM may properly declare a mining claim located on land withdrawn and closed to mineral entry null and void ab initio. The location date for such mining claim will not relate back to a mining claim located prior to the withdrawal where the previous mining claim was conclusively presumed to be abandoned and void pursuant to sec. 314(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(c) (1982), for failure to record the notice of location in a timely manner.

McCarthy Mining & Development Co., 87 IBLA 172 (June 13, 1985)

Mining claims located on land closed to entry and location under the mining laws by a withdrawal order of the Secretary of the Interior pursuant to the Alaska Native Claims Settlement Act are null and void ab initio; however, where such a withdrawal order does not specifically close the land to mineral location, but only to mineral leasing, and there is no indication that mineral location was to be foreclosed, the withdrawal order will not be held to preclude mineral location.

Whelan's Mining & Exploration, Inc., 88 IBLA 336 (Sept. 19, 1985)

POWERSITES

Lands covered by a preliminary permit issued to a prospective licensee by the Federal Energy Regulatory Commission are not open to mineral location, and mining claims made on such lands are properly declared null and void ab initio.

The fact that a permittee may not ultimately use all of the land encompassed in his preliminary permit does not alter the fact that land embraced by the permit is not open to location.

Robert Farchi, 86 IBLA 273 (Sept. 5, 1985)

RECLAMATION WITHDRAWALS

Ordinarily an application to restore lands within a reclamation withdrawal to mineral entry pursuant to the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982), will be rejected by the Bureau of Land Management where the Bureau of Reclamation recommends against restoration. However, on appeal a case may be remanded for further consideration by the appropriate agencies, including preparation of a mineral report, where it appears warranted by the appellant's showings and willingness to accept terms and conditions to protect the Government's interest.

Robert Limbert, Otis Schoolcraft, 85 IBLA 131 (Feb. 19, 1985)

WITHDRAWALS AND RESERVATIONS--Continued

RECLAMATION WITHDRAWALS--Continued

A mining claim located on lands which are withdrawn for reclamation purposes under the first form is null and void ab initio. A first-form reclamation withdrawal completed prior to Oct. 21, 1976, remains in effect, subject to review by the Secretary, nonwithstanding the repeal of the statute authorizing the initiation of such withdrawals.

William B. Rawlings, 85 IBLA 243 (Mar. 4, 1985)

A mining claim located on land previously withdrawn from appropriation under the mining laws by a first form reclamation withdrawal is null and void ab initio.

Maynard C. Campbell, Jr., 85 IBLA 295 (Mar. 13, 1985)

A mining claim is properly declared null and void if the land at the time of the location is withdrawn from appropriation under the mining laws by a first-form reclamation withdrawal. Once land has been withdrawn from mineral entry, it remains withdrawn until the withdrawal is formally revoked. It is immaterial whether the lands are or will be used for the purpose for which they are withdrawn.

Florian L. Glineski, Mike Gilleran, 87 IBLA 266 (June 25, 1985)

REVOCATION AND RESTORATION

Ordinarily an application to restore lands within a reclamation withdrawal to mineral entry pursuant to the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982), will be rejected by the Bureau of Land Management where the Bureau of Reclamation recommends against restoration. However, on appeal a case may be remanded for further consideration by the appropriate agencies, including preparation of a mineral report, where it appears warranted by the appellant's showings and willingness to accept terms and conditions to protect the Government's interest.

Robert Limbert, Otis Schoolcraft, 85 IBLA 131 (Feb. 19, 1985)

STATE SELECTIONS

Under 43 CFR 2091.6-4 and 2627.4(b), the filing of an application by the State of Alaska to select lands segregates those lands from all subsequent appropriation, including location under the mining law. A mining claim located on land segregated and closed to mineral entry is properly declared null and void ab initio.

Thomas C. Bay, Joyce R. Bay, 87 IBLA 194 (June 13, 1985)

WORDS AND PHRASES--Continued

of the unsurveyed land is not waived when the unsurveyed land is covered by a protraction survey.

Dennis J. Kitts, 84 IBLA 338 (Jan. 15, 1985)

"Tender." Placing a check for annual rental for oil and gas leases in the mails does not constitute a tender of payment within the meaning of 43 CFR 3108.2-1(c). A tender of rental payment is made only when a lessee submits payment to the BLM office administering his lease, providing BLM with the opportunity either to receive or decline payment. Accordingly, placing rental in the mails does not constitute a tender of payment which would allow the Department to consider the merits of a petition for a class I reinstatement of an oil and gas lease.

William E. Phalen, 85 IBLA 151 (Feb. 25, 1985)

"Interest in an oil and gas lease or offer." Where an applicant for an oil and gas lease has executed a note entitling the holder to 60 percent of the proceeds from a Federal oil and gas lease, the holder of the note has an interest in the oil and gas lease pursuant to 43 CFR 3100.0-5(b) (1982).

Joshua Basin Partnership, Taylor Basin Partnership, Shasta Basin Partnership, Mesozoic-Paleozoic Joint Venture, 87 IBLA 179 (June 13, 1985)

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